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No. 00-

IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held—in conflict with the established rule in other circuits—that an impairment precluding an individual from performing only a limited number of tasks associated with a specific job qualifies as a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Toyota Motor Manufacturing, Kentucky, Inc. was defendant in the District Court and appellee before the United States Court of Appeals for the Sixth Circuit. Pursuant to S. Ct. Rule 29.6, petitioner notes that it is wholly owned by Toyota Motor Manufacturing North America, Inc., which is in turn wholly owned by Toyota Motor, North America, Inc., which is in turn wholly owned by Toyota Motor Corporation.

Respondent Ella Williams was plaintiff before the District Court and appellant before the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Toyota Motor Manufacturing, Kentucky, Inc. ("TMMK") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit reversing the District Court's grant of summary judgment is reported at 224 F.3d 840 and reprinted in the appendix hereto ("App.") at 1a. That opinion amended and superseded a previous opinion, reprinted at App. 12a. The opinion of the District Court granting TMMK's motion for summary judgment is not reported and is reprinted at App. 23a.

JURISDICTION

The initial judgment of the Sixth Circuit, entered on July 10, 2000, was withdrawn and an amended judgment entered on August 29, 2000. App. 1a. A timely petition for rehearing and rehearing *en banc* was denied on October 12, 2000. App. 57a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(2)(A) of the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327, 329-330, 42 U.S.C. § 12102(2)(A), provides, in pertinent part: "The term 'disability' means, with respect to an individual * * * a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Section 1630.2(i), of Title 29, Code of Federal Regulations, provides: "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Section 1630.2(j)(1)(i), (ii) of Title 29, Code of Federal Regulations, provides, in pertinent part: "The term substantially limits means: Unable to perform a major life activity * * * or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."

INTRODUCTION

This case concerns the reach of the ADA to individuals whose impairments preclude them from performing only a narrow category of tasks associated with their specific jobs. The ADA by its terms covers only those who have a "disability"—defined as an "impairment that substantially limits one or more of the major life activities." 42 U.S.C. §

12102(2)(A). As both Congress and this Court have emphasized, the statute does not encompass "[p]ersons with minor, trivial impairments," S. Rep. No. 101-116, at 23 (1989), but instead "concerns itself only with limitations that are *in fact* substantial" and that "significantly restrict" the ability to perform a major life activity. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 565 (1999) (emphasis added); *see* 29 C.F.R. § 1630.2(j)(1)(ii).

Ella Williams, the respondent in this case, could perform the manual tasks required by several assembly-line positions at TMMK, but due to carpal tunnel syndrome and tendinitis was unable to perform one particular job that "require[d] the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." App. 6a. A divided panel of the Court of Appeals below held that even though Williams could perform a broad range of manual tasks at both work and home, she was "disabled" under the ADA because "her impairment substantially limits her ability to perform the range of manual tasks associated with *an* assembly line job." *Id.* 4a (emphasis added). That ruling directly conflicts with decisions from other circuits on the scope of the ADA. Those courts have consistently held that a partial limitation that affects only a narrow range of jobs does not—in the language of the ADA—"substantially limit[] one or more of the major life activities." 42 U.S.C. § 12102(2)(A).

The majority opinion below also conflicts with recent precedents from this Court emphasizing that "only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Kirkingburg*, 527 U.S. at 565 (brackets omitted). As Judge Boggs pointed out in dissent below, the panel's opinion "mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to 'perform manual tasks,' and erroneously treats a partial limitation there as substantially limiting a major life activity." App. 11a (emphasis in

original). This Court should grant certiorari to resolve the multiple conflicts on the important and recurring question presented.

STATEMENT OF THE CASE

Located in Georgetown, Kentucky, TMMK employs more than 7,500 individuals, many of whom work on assembly lines that produce Toyota automobiles sold in the United States and abroad. Respondent Ella Williams joined TMMK in 1990, and soon began work on an assembly line that fabricated engines. Within months, however, she developed bilateral carpal tunnel syndrome ("CTS") in her wrists and bilateral tendinitis in her neck and arms, each affliction apparently the product of having had to grip vibrating pneumatic tools to perform her job.[1]

In an effort to accommodate Williams, TMMK assigned her to Quality Control Inspection Operations ("QCIO"), a unit of the assembly line known for having "the 'easiest jobs' at TMMK." App. 25a. Although most employees within QCIO were typically expected to be able to work at any of four stations during a given shift, Williams rotated each week between two of the least physically taxing QCIO positions. In the first of these, she visually inspected painted cars as they moved slowly along a conveyor, searching for imperfections that might have occurred during the assembly or paint process. For a while, that job also required Williams to open and shut the doors, trunk, and hood of each passing car. Demanding slightly more physical exertion, the second QCIO position required Williams to use both arms to wipe down each painted car as it progressed along the conveyor.

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[1] CTS "is caused by compression of the median nerve as it passes through the wrist between flexor tendons and the transverse carpal ligament. This area is called the carpal tunnel." 3 Robert K. Ausman & Dean E. Snyder, *Ausman & Snyder's Medical Library* § 4:18, at 53 (1989).

Throughout her approximately three-year tenure with QCIO, "[i]t is undisputed that Williams was physically capable of performing these jobs and that her actual performance was satisfactory." *Id.* 26a.

Eventually, TMMK determined that every QCIO employee should be trained and capable of working at all four QCIO jobs. Among the two that Williams had yet to work was another paint-inspection position. This one, however, required her to "grip a block of wood with a sponge attached to the end and wipe down the passing cars with a highlight oil at the rate of approximately one car per minute." *Id.* 2a. Beyond the need to grip a tool, the job also differed from Williams's previous positions in that she had to work at regular intervals with her hands and arms at shoulder height. *Id.*

Despite completing without difficulty a week-long training regimen for this position, Williams allegedly began to experience pain in her arms, hands, shoulders, and neck after several weeks at the new job. By her own account, Williams concluded that she was physically incapable of performing the duties that this new position demanded. She did not, however, consider herself unable to perform all assembly-line work. In fact, Williams herself suggested that TMMK return her to her previous two positions, both of which she "always maintained that she could perform without difficulty." *Id.* 27a. Due to her on-going difficulties, however, Williams eventually refused to show up for work. TMMK, in turn, deemed her to have voluntarily resigned her employment and terminated her.

Williams subsequently brought suit under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, claiming that TMMK had failed to offer her a reasonable accommodation. TMMK moved for summary judgment on the ground that Williams's ailments did not constitute a "disability" under the ADA. *See id.* § 12102(2). Although

Williams maintained that her impairment affected such major life activities as performing manual tasks and working,[2] TMMK argued that an inability to perform only a narrow subset of assembly-line duties—while remaining perfectly capable of executing a host of manual tasks, including the very assembly-line work Williams had performed the previous three years—did not "substantially limit[] one or more of the major life activities." *Id.* § 12102(2)(A).

The District Court granted TMMK's motion for summary judgment. With respect to the major life activity of performing manual tasks, the court agreed with TMMK that Williams's claim was "irretrievably contradicted by [her] continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." App. 36a. Turning to the major life activity of working, the court found dispositive the well-established principle that to be considered substantially limited in that major life activity, an ADA plaintiff "must show more than an inability to perform a single job or the job of her choice." *Id.* 37a (citing *Skorup* v. *Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998); *Gilday* v. *Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997)).[3]

Williams appealed, and a divided panel of the Sixth Circuit reversed. App. 1a. In reaching its decision, the panel purported to resolve only the question whether "Williams is

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[2] Williams suggested that her impairment also limited the major life activities of "housework," "gardening," and "playing with her children." App. 34a-35a. The District Court rejected these claims, *id.* 35a-36a, and Williams did not press them on appeal.

[3] Williams also maintained that TMMK violated the ADA and the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, by discontinuing her employment when she refused to return to work. On both claims, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of TMMK. App. 6a-8a.

substantially limited in performing manual tasks." *Id.* 5a. Nevertheless, the panel began its analysis with *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), where this Court held that to be substantially limited in the major life activity of working, an "individual [must] be unable to perform a class or broad range of jobs." App. 3a-4a. Based on *Sutton*, the panel reasoned that "[i]t would appear * * * that in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks *at work*." *Id.* 4a (emphasis added).

The panel acknowledged that to be disabled under *Sutton*'s class-based framework "'[o]ne must be precluded from more than one type of job.'" *Id.* (quoting *Sutton*, 527 U.S. at 492). It nevertheless determined—without citation to any authority—that with respect to the major life activity of performing manual tasks, the "notion of 'class' advocated by the *Sutton* Court can be based on a more limited concept than 'working,' and can be based on limits on manual activities which can *affect* other major life activities." *Id.* 6a (emphasis added).

The upshot of the panel's opinion was that Williams could demonstrate a *substantial limitation* on her ability to perform manual tasks by simply showing that her impairment "affected" her ability to work—even if the impairment did not otherwise substantially limit her in the major life activity of working. According to the panel, it was irrelevant that Williams remained perfectly capable of accomplishing any number of manual tasks outside of the narrow subset of assembly-line duties that gave her difficulty. *Id.* 4a. It was enough simply that "her impairment substantially limit[ed] her ability to perform the range of manual tasks associated with an assembly line job." *Id.*; *see id.* 5a ("she suffer[ed] from a severe impairment * * * that seriously reduce[d] her ability to perform the manual tasks that are job-related"). And even though Williams, by her own admission, remained capable of manually wiping down cars as she had done for

the previous three years, the panel nonetheless considered her disabled because she could not perform the narrow category of "manual activities that * * * require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." *Id.* 6a.

Judge Boggs dissented. He observed that under "decisions of this and other courts, [Williams's] inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working" since an "inability to perform a single, particular job does not constitute a substantial limitation on working." *Id.* 9a. Yet "the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to 'perform manual tasks,' and erroneously treats a partial limitation there as substantially limiting a major life activity." *Id.* 11a (emphasis in original).

Allowing a plaintiff to defeat summary judgment by merely "'show[ing] that her manual disability involves a class of manual activities affecting the ability to perform tasks at work * * * conflates (and erodes) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.' " *Id.* "These are separate inquiries," *id.*, and Williams failed both. She plainly did not demonstrate a substantial limitation on working because her impairment foreclosed her from performing only a "single, particular job." *Id.* Nor did she establish a substantial limitation with respect to manual tasks, for "her limitation is mostly confined to a subset of job-specific tasks." *Id.*; *see id.* 9a-10a ("as the court's opinion again correctly notes, Williams's difficulty is almost exclusively with the inability to do manual tasks that 'require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time' "). Indeed, "the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping

task [at TMMK] that she already had been doing prior to her newest assignment." *Id.* 9a.

Judge Boggs also found it telling that there are "no citations in the court's opinion, either to regulations or to cases, indicating that such a specific and partial limitation is considered a disability." *Id.* 10a. The reason: the vast majority of federal courts have concluded that such job-specific restrictions do *not* substantially limit the major life activities of performing manual tasks, taking care of oneself, or, of course, working. *Id.* Based on these cases, Judge Boggs concluded that "[m]easuring Williams's limitation against plaintiffs claiming similar limitations on other major life activities, she does not appear disabled." *Id.*

TMMK filed a timely petition for rehearing and rehearing *en banc*, which was denied on October 12, 2000. *Id.* 57a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE IMPORTANT AND RECURRING QUESTION WHETHER AN ISOLATED INJURY PRECLUDING AN INDIVIDUAL FROM ONE PARTICULAR JOB CONSTITUTES A DISABILITY UNDER THE ADA

The Sixth Circuit's decision in this case generates a split among the circuits on an important issue that federal courts regularly face: whether an impairment qualifies as a disability under the ADA if it precludes an individual from performing only a limited subset of tasks associated with her specific job. The rule that the Sixth Circuit articulated in this case is that an impairment that merely "*affect[s]* manual tasks associated with working" constitutes a disability under the statute. App. 6a (emphasis added). Other circuits, however, have steadfastly refused to expand the scope of ADA protection to employees afflicted with an isolated injury that prevents them from performing a narrow subset of job-related functions. This Court should grant certiorari to

resolve this conflict between the decision below and recent decisions from the other courts of appeals. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

To begin with, the decision below directly conflicts with decisions of other circuits expressly holding that a plaintiff is not substantially limited in the major life activity of performing manual tasks simply because she cannot execute a narrow group of job-specific functions. *See, e.g., Chanda* v. *Engelhard/ICC*, ___ F.3d ___, 2000 WL 1772682, at *3 (11th Cir. Dec. 4, 2000) ("We are persuaded that a plaintiff must demonstrate that he is substantially limited in a *range* of manual tasks rather than a *narrow category* thereof.") (emphasis added); *Hilburn* v. *Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1228 (11th Cir. 1999) (plaintiff's inability to perform certain job functions did not substantially limit her in the major life activity of performing manual tasks where she could "walk and run, sit and stand, sleep and eat, bathe, dress, write with a pencil and pen, work around the house, cook, and work") (internal quotations omitted); *Snow* v. *Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997) ("Snow's assertion that her ability to perform manual tasks and work is so impaired that it constitutes a disability is unconvincing where there is no evidence that she is thereby precluded from performing a class or broad range of jobs as compared to average persons in the general population.").

The rule that the Sixth Circuit adopted below would have dictated entirely different results in *Chanda*, *Hilburn*, and *Snow*. In *Snow*, the plaintiff—a laboratory and radiological technician—suffered an injury to her neck and spine that prevented her from lifting more than twenty-five pounds, lifting patients, and pushing heavy equipment. No longer able to perform the tasks associated with a full-time laboratory technician, the plaintiff was terminated. She brought

suit under the ADA claiming that her injury affected her in the major life activity of performing manual tasks.

Unlike the Sixth Circuit below, the Eighth Circuit in *Snow* began its analysis with the language of the statute and the interpretive guidelines promulgated by the Equal Employment Opportunity Commission ("EEOC"). The court observed that

> [t]o 'substantially limit' a major life activity means to render an individual *unable* to perform a basic function that the average person in the general population can perform, or to *significantly restrict* the condition, manner, or duration under which an individual can perform a particular major life activity as compared to an average person in the general population. [128 F.3d at 1206 (citing 29 C.F.R. § 1630.2(j)(1)(i), (ii)) (emphasis added).]

Because an impairment must, at the very least, "significantly restrict" an individual's ability to perform a major life activity to constitute a disability under the ADA, the Eighth Circuit reasoned that "[i]t is not enough that an impairment *affect* a major life activity." *Id.* at 1207 (emphasis added). Accordingly, the court concluded that the plaintiff's "assertion that her ability to perform manual tasks and work is so impaired that it constitutes a disability is unconvincing where there is no evidence that she is thereby precluded from performing a class or broad range of jobs as compared to average persons in the general population." *Id.*

The divided panel's decision in the case below is in direct conflict with the holding in *Snow*. Instead of hewing to the plain regulatory language defining "substantially limited," the Sixth Circuit's decision substitutes "affect" for "significantly restrict." Thus, contrary to the rule that the Eighth Circuit articulated in *Snow*, an ADA plaintiff in the Sixth Circuit can now establish a disability by doing no more than showing that her impairments "affect manual tasks associated

with working." App. 6a. *Compare id. with Snow*, 128 F.3d at 1207 ("It is not enough that an impairment affect a major life activity."). Indeed, had that diluted standard governed the proceedings in *Snow*, the plaintiff there certainly would have survived summary judgment: her inability to lift patients and move machinery obviously affected the manual tasks associated with working as a laboratory technician, and ultimately led to her termination.

The decision below is also at odds with the Eleventh Circuit's decision in *Hilburn*. The plaintiff in that case argued that her coronary disease "caused her to have a decreased tolerance for * * * performing essential manual tasks," though by her own admission it precluded her from performing only those jobs requiring her to lift objects. *Hilburn*, 181 F.3d at 1222-23. As did the Eighth Circuit in *Snow*—but unlike the court below—the Eleventh Circuit measured the plaintiff's putative disability against the plain language of the statutory and regulatory text. Recognizing that "a physical impairment alone is not necessarily a disability under the ADA," *id.* at 1226, the court emphasized that the touchstone is proof that an individual is either entirely "[u]nable to perform * * * or [s]ignificantly restricted" in performing a major life activity as compared to the average person in the general population. *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)(i)-(ii)).

As the phrase would suggest, to be "significantly restricted" in performing manual tasks requires much more than a simple inability to accomplish a narrow category of tasks associated with a particular job. In *Hilburn*, therefore, the court rejected the plaintiff's claim of disability because she remained perfectly capable of, among other things, walking, running, standing, bathing, dressing, writing, and cooking. *Hilburn*, 181 F.3d at 1228. Her purported inability to lift objects notwithstanding, the Eleventh Circuit considered it fatal to the plaintiff's claim that she did not "identify,

specifically or by class, any of the manual tasks that she is unable to perform." *Id.*

In stark contrast, the Sixth Circuit below found Williams to be disabled based on nothing more than an inability to perform one exceptionally narrow mode of tactile functions relating to one specialized assembly-line job: "manual activities that * * * require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." App. 6a. Indeed, Williams was not even foreclosed from all repetitive functions employing her hands and arms, or all assembly-line positions; the three years she spent on an assembly line wiping down freshly painted cars proves as much. *Cf. DePaoli* v. *Abbott Labs.*, 140 F.3d 668, 673 (7th Cir. 1998) (finding individual substantially limited in the major life activity of working where she became "disabled from performing virtually any employment that required repetitive motions of her right hand"). But more importantly, like the plaintiff in *Hilburn*, Williams remained perfectly capable of performing a great number of manual tasks with no more difficulty than the "average person in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). *See* App. 9a ("the record shows that she can perform the manual tasks of brushing her teeth, laundering her clothes, and doing some driving").

Underscoring this conflict among the circuits, the Eleventh Circuit just recently declined to follow the very decision of the Sixth Circuit below. *See Chanda*, ___ F.3d ___, 2000 WL 1772682, at *4. In *Chanda*, the plaintiff had developed tendinitis in his right hand from routinely cutting foamboard during the course of his employment. That repetitive-motion injury left him unable to use his right hand to type, use a computer, write, grasp, or lift.

In rejecting the plaintiff's disability claim, the Eleventh Circuit held—in direct conflict with the decision below—that "a plaintiff must demonstrate that he is substantially limited

in a *range* of manual tasks rather than a *narrow category* thereof." *Id.* at *3 (emphasis added). The court observed that "Chanda's only restrictions that were severe, of lengthy duration, and with a long term impact were related to a narrow category of tasks, such as typing or cutting foamboard for an extensive period of time." *Id.* Despite those difficulties—job-related though they may be—he remained capable of "perform[ing] daily activities, including dressing himself, driving, and attending classes or working in a position requiring computer usage." *Id.* Accordingly, the court concluded that his impairment "falls short of substantially limiting the major life activity of performing manual tasks." *Id.*

Although purporting only to distinguish the Sixth Circuit's decision—citing the case-by-case nature of ADA claims—the Eleventh Circuit quite clearly articulated a rationale that directly conflicts with the decision below. For unlike the Eleventh Circuit, the divided panel in this case thought it unnecessary for an ADA plaintiff to "demonstrate that he is substantially limited in a range of manual tasks." *Id.* Indeed, Williams, like the plaintiff in *Chanda*, had no problem "perform[ing] a range of isolated, non-repetitive manual tasks * * * such as tending to her personal hygiene or carrying out personal or household chores." App. 4a; *see id.* 9a (Boggs, J., dissenting) ("Williams can perform many manual tasks, beginning, most obviously, with the wiping task that she already had been doing prior to her newest assignment."). Instead, the court below found Williams to be disabled simply because her impairment hampered her ability to perform a narrow range of manual tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." App. 4a. Elevating such a partial impairment to the status of disability squarely conflicts with the Eleventh Circuit's rule that a disability cannot be based on "restrictions that * * * relate[] to a narrow category of tasks." *Chanda*, 2000 WL 1772682, at *3.

The Sixth Circuit's novel approach to the major life activity of performing manual tasks also conflicts with decisions from the courts of appeals addressing the major life activity of working. Every circuit—including the Sixth—has held that "[t]he inability to perform in a single, particular job does not constitute a substantial limitation in the major life activity of working." *Colwell* v. *Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998) (quoting 29 C.F.R. § 1630.2(j)(3)(i)), *cert. denied*, 526 U.S. 1018 (1999); *accord Santiago Clemente* v. *Executive Airlines, Inc.*, 213 F.3d 25, 32 (1st Cir. 2000); *Olson* v. *General Elec. Astrospace*, 101 F.3d 947, 952 (3d Cir. 1996); *Halperin* v. *Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997); *Dutcher* v. *Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995); *McKay* v. *Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997); *Skorup* v. *Modern Door Corp.*, 153 F.3d at 515; *Gutridge* v. *Clure*, 153 F.3d 898, 901 (8th Cir. 1998), *cert. denied*, 526 U.S. 1115 (1999); *Broussard* v. *University of Cal.*, 192 F.3d 1252, 1256-1257 (9th Cir. 1999); *Bolton* v. *Scrivner, Inc.*, 36 F.3d 939, 942-943 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); *Standard* v. *A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1327 (11th Cir. 1998); *Duncan* v. *Washington Metro. Area Transit Auth.*, 201 F.3d 482, 486 (D.C. Cir.), *vacated pending rehearing en banc*, 2000 WL 360095, at *1 (D.C. Cir., Mar. 31, 2000).

The panel's decision below effectively renders this restriction on the ADA's scope a dead letter, and at the same time legitimates claims of disability that the federal courts have heretofore rejected. That is because, under the Sixth Circuit's rule, an ADA plaintiff is deemed "substantially limited" in the major life activity of performing manual tasks if she can simply demonstrate that her impairment "affect[s] manual tasks *associated with working*." App. 6a (emphasis added). Therefore, a plaintiff in the Sixth Circuit, whose

injuries foreclose her from only one particular type of job and who would otherwise not be considered substantially limited in the major life activity of working, can now simply recast her impairment as a substantial limitation on the major life activity of performing manual tasks. By doing so, it is no longer fatal to her disability claim that she is precluded from only one particular job. Quite the opposite is true; for, under the panel's decision, an inability to work a single job "affects" the major life activity of working—even if it does not substantially limit it.

The Sixth Circuit's decision therefore creates a significant split in the circuits over a recurring issue of great national importance. As a practical matter, work-related impairments of similar scope will be treated dissimilarly under the ADA. The Seventh Circuit's decision in *Skorup* is a perfect example. Like Williams, the plaintiff in *Skorup* was transferred to a new position at work that, due to a preexisting case of tendinitis, became too painful to perform. Also like Williams, the plaintiff's impairment was limited in scope, affecting only those "jobs that require a repetitive pulling motion of the shoulder." *Skorup*, 153 F.3d at 513.

The Seventh Circuit concluded that the plaintiff's impairment did not substantially limit her in the major life activity of working. Writing for the court, Judge Kanne explained that "[t]he [ADA] is not a general protection of medically afflicted persons." *Id.* at 514 (quoting *Christian* v. *St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir.), *cert. denied*, 523 U.S. 1022 (1998)). Accordingly, "'an inability to perform a particular job for a particular employer' is not sufficient to establish a substantial limitation on the ability to work; rather, 'the impairment must substantially limit employment generally.' " *Id.* (quoting *Weiler* v. *Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996)). Although the plaintiff claimed that "she cannot perform any and all jobs which require repetitive stretching and pulling of the shoulder, she provide[d] no evidence of the number of jobs from

which she [was] precluded because of this impairment." *Id.* at 515. Under the Sixth Circuit decision below, however, the *Skorup* plaintiff's inability to perform a job requiring repetitive stretching and pulling of the shoulder would have been deemed a disability since it "affect[ed] manual tasks associated with working." App. 6a.

Similarly, in *Gutridge*, the plaintiff developed carpal and cubital tunnel syndromes in both wrists. *See Gutridge*, 153 F.3d at 900. That injury left him unable to perform his on-site computer-technician position, which required him to transport and carry equipment between jobs. Nevertheless, the Eighth Circuit held that the plaintiff's impairment did not substantially limit him in the major life activity of working. *Id.* "Substantially limits," the court observed, "means 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Although the plaintiff could not perform his previous job, he was "still able * * * to function as a computer repair technician for other employers who either do not require lifting as part of their job duties or can provide assistance." *Id.* at 901. That case would have come out the other way under the divided panel's decision below. Again, by simply recasting the ADA claim in terms of performing manual tasks, the plaintiff would have been considered disabled because his carpal tunnel syndrome obviously affected his ability to "perform the manual tasks that are job-related." App. 5a.

The Sixth Circuit decision below is also at odds with the Fifth Circuit's decision in *Dutcher*. The plaintiff there, a welder by trade, claimed that an injury to her right arm substantially limited her in the major life activity of working. *See Dutcher*, 53 F.3d at 724-725. Just as Williams in the case below could perform some assembly-line jobs but not others requiring particular muscle movements, the plaintiff in *Dutcher* was precluded only from welding jobs requiring her to climb great heights to reach her work.

Writing for a unanimous panel, Chief Judge Politz emphasized that "the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working." *Id.* at 727. Moreover, with language tailored to *all* major life activities under the ADA, the court held that "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one." *Id.* (citation omitted). The Sixth Circuit's rule, in contrast, expressly provides that an individual is substantially limited in the major life activity of performing manual tasks if her impairment affects her "ability to perform the range of manual tasks associated with an assembly line job." App. 4a.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT PRECEDENTS CONSTRUING THE ADA

Not surprisingly, in placing itself in conflict with the other circuits, the court below misapplied this Court's precedents. Specifically, the Sixth Circuit departed from this Court's decisions in two important ways. *First*, by requiring that an impairment merely "affect" instead of "significantly restrict" a major life activity to constitute a disability, the panel ignored—indeed, it did not even cite—this Court's decision in *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 563 (1999), which rejected a similarly flawed interpretation of the ADA. *Second*, by allowing an individual to prove a substantial limitation on one major life activity—performing manual tasks—by demonstrating a mere effect on another major life activity—working—the panel below improperly conflated inquiries that this Court has recognized as distinct. *See Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 491-493 (1999); *Murphy* v. *United Parcel Serv., Inc.*, 527 U.S. 516, 523-525 (1999). These additional conflicts provide an alternative basis for granting the petition. *See* S. Ct. Rule 10(c) (one of the principal considerations governing the

exercise of certiorari jurisdiction is whether a court of appeals "has decided an important question in a way that conflicts with relevant decisions of this Court").

The errors that the Sixth Circuit committed in determining who is an individual with a disability under the ADA are virtually identical to the Ninth Circuit's "missteps" that this Court thought "worthwhile to address" in *Kirkingburg*. 527 U.S. at 562. The question there was whether the plaintiff's monocular vision alone "substantially limit[ed]" him in the major life activity of seeing. *Id.* at 563. The Ninth Circuit acknowledged that to be substantially limited, the plaintiff had to be "[s]ignificantly restrict[ed] as to the condition, manner or duration under which [he] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). In finding that the plaintiff's impairment significantly restricted him, the Ninth Circuit reasoned that "the manner in which Kirkingburg sees differs significantly from the manner in which most people see because * * * he sees using only one eye; most people see using two." *Kirkingburg*, 527 U.S. at 564 (brackets and internal quotation marks omitted).

This Court, however, found that the court of appeals "was too quick to find a disability." *Id.* Instead of requiring ADA plaintiffs to demonstrate a "significant restriction" in their ability to perform a major life activity, the Ninth Circuit "appeared willing to settle for a mere difference." *Id.* at 565. This Court explained that "[b]y transforming 'significant restriction' into 'difference,' the court undercut the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Id.* (brackets omitted).

Just as the Ninth Circuit mistakenly thought a "mere difference" in an individual's manner of performing a major life activity constituted a disability, the majority below improperly thought it sufficient that an individual's impairments merely "*affect* manual tasks associated with working." App. 6a (emphasis added). Although "the Act 'addresses substantial limitations on major life activities, not utter inabilities,' it concerns itself only with limitations that are *in fact substantial*." *Kirkingburg*, 527 U.S. at 565 (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 641 (1998)) (emphasis added). As this Court held in *Sutton*, " 'substantially' suggests 'considerable' or 'specified to a large degree.' " *Sutton*, 527 U.S. at 491 (quoting Webster's Third New International Dictionary 2280 (1976)); *see also* 17 Oxford English Dictionary 66-67 (2d ed. 1989) ("substantial": "[r]elating to or proceeding from the essence of a thing; essential"; "of ample or considerable amount, quantity or dimensions"). That an impairment merely "affects" a major life activity says absolutely nothing about whether it limits substantially, considerably, or to a large degree an individual's ability to perform that same activity. 42 U.S.C. § 12102(2)(A). *See Snow*, 128 F.3d at 1207 ("It is not enough that an impairment affect a major life activity; the plaintiff must proffer evidence from which a reasonable inference can be drawn that such activity is substantially or materially limited.").

Moreover, as Judge Boggs explained in dissent below, to say that a plaintiff is substantially limited in performing manual tasks simply because she has an impairment that affects her ability to perform tasks *at work* "conflates (and erodes) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.' " App. 11a (Boggs, J., dissenting); *see id.* 4a ("in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work"). These are, as Judge Boggs noted, "separate inquiries." *Id.* 11a.

This Court's decision in *Sutton* confirms that "working" and "performing manual tasks" are indeed distinct inquiries, and that each must be resolved without reference to the other. There, this Court emphasized that "working [should] be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.' " *Sutton*, 527 U.S. at 492 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)) (emphasis in original). A corollary to this principle is that "[i]f an individual is substantially limited in *any other* major life activity, *no determination should be made* as to whether the individual is substantially limited in working." *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j)) (first emphasis in original, second emphasis added).

The Sixth Circuit's hybrid rule—incorporating elements of "working" into a "performing manual tasks" inquiry—violates *Sutton*'s injunction to make "no determination" regarding the major life activity of working until the court has assessed all other major life activities. That is because the rule requires a court to evaluate how an impairment affects a plaintiff's ability to work in order to determine whether that impairment limits the major life activity of performing manual tasks. Not only does the panel's decision improperly fuse two distinct analyses into one, but it also significantly eases a plaintiff's evidentiary burden under the ADA by declaring that a mere effect—not a significant restriction—on the major life activity of working is enough to demonstrate a substantial limitation on performing manual tasks. As Judge Boggs recognized in dissent below:

> it seems to me that if considering the concept of working is only a "last resort," the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to "perform manual tasks," and erroneously treats a partial limitation there as substantially limiting a major life activ-

ity. [App. 11a (Boggs, J., dissenting) (emphasis in original).]

That "undercuts the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Kirkingburg*, 527 U.S. at 565.

III. THE CONFLICT AMONG THE CIRCUITS CONCERNS AN IMPORTANT AND RECURRING ISSUE THAT SHOULD BE DECIDED BY THIS COURT

The multiple conflicts presented by this petition provide a compelling basis for plenary review, but the need for certiorari is heightened still further by the important and recurring nature of the basic question presented: whether an impairment constitutes a disability under the ADA if it precludes an individual from performing a narrow subset of tasks associated with her specific job. This question is exceptionally important to employers in private industry because repetitive-motion injuries like CTS are becoming increasingly widespread among American workers. As more and more employees develop isolated repetitive-motion injuries, many of which may preclude them from performing the manual tasks associated with an aspect of a specific job, the extent to which employers must offer costly accommodations to this rapidly growing segment of the workforce will assume critical importance.

In 1990, cumulative trauma disorders, of which CTS is one, affected 185,400 American workers. *See* Joan E. Rigdon, *The Wrist Watch: How a Plant Handles Occupational Hazard with Common Sense*, Wall St. J., Sept. 28, 1992, at A1. That was almost *nine times* the number reported only eight years earlier. *See id.* And while repetitive stress accounted for only 21% of all workplace injuries in 1982, by 1992, it had grown to represent 56% of those injuries. *See*

Paul J. Lim, *Innovations for Carpal-Tunnel Syndrome Prospering*, Wall St. J., Aug. 24, 1992, at B2.

This trend has only accelerated in recent years. In 1996 alone, doctors performed 358,000 ambulatory surgery procedures solely to release carpal tunnel. *See* Statistical Abstract of the United States 141 tbl. 215 (119th ed. 1999). More importantly, in 1998, CTS alone caused employees in private industry to miss 26,266 days of work collectively. *See* U.S. Dep't of Labor, Bureau of Labor, Report of Nonfatal Occupational Injuries at tbl. R49 (Nov. 16, 2000) <http://stats.bls.gov/oshC_D98.htm>. The manufacturing industry accounted for nearly half of those days—11,630. *Id.*

These statistics illustrate that while CTS and other repetitive-motion injuries are increasingly prevalent in the workplace, they are not novel. The volume of circuit decisions handed down in the last five years involving ADA claims based on repetitive-motion injuries confirms that. *See, e.g.*, *Chanda*, 2000 WL 1772682, at *3; *Broussard*, 192 F.3d at 1259; *Hilburn*, 181 F.3d at 1222-1223; *Gutridge*, 153 F.3d at 900; *Skorup*, 153 F.3d at 513; *Dalton* v. *Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 671-674 (7th Cir. 1998); *Snow*, 128 F.3d at 1204-1205; *Dutcher*, 53 F.3d at 724-726; *Shpargel* v. *Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996); *Terrell* v. *USAir, Inc.*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996), *aff'd*, 132 F.3d 621 (11th Cir. 1998). Until the Sixth Circuit's decision below, the consensus among the circuits was that "[a]n impairment that affects only a narrow range of jobs can be regarded as not reaching a major life activity or as not substantially limiting one." *Dutcher*, 53 F.3d at 727 (citation omitted).

This view reflects Congress's considered judgment that the ADA should "concern[] itself only with limitations that are in fact substantial," *Kirkingburg*, 527 U.S. at 565, and not encompass "[p]ersons with minor, trivial impairments." S. Rep. No. 101-116, at 23 (1989). The reason: the ADA is an

antidiscrimination statute designed to extend to persons with disabilities "the same civil right protections provided to women and minorities beginning in 1964." H.R. Rep. No. 101-485, pt. 3 at 26 (1990). The Sixth Circuit's decision, however, threatens to remove the ADA from its antidiscrimination moorings and transform it into what it most certainly is not: "a general protection of medically afflicted persons." *Christian* v. *St. Anthony Med. Ctr., Inc.*, 117 F.3d at 1053.

Finding disabilities where employees can no longer perform only a narrow range of job-specific tasks advances no legitimate antidiscrimination principle. Indeed, employees who are precluded from only a narrow category of jobs are hardly who Congress had in mind when it found that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. [42 U.S.C. § 12101(a)(7).]

Individuals with the same sort of impairments should not be covered under the ADA in one part of the country but not in another. Employees working for the same national company should not have coverage turn on which plant they happen to work at. This Court should grant review of the divided decision below to ensure that the ADA is construed in a uniform manner across the country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5234

ELLA WILLIAMS,
Plaintiff-Appellant,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky
Henry R. Wilhoit, Jr., Chief Judge, Presiding

Argued and Submitted February 1, 2000
Decided and Filed August 29, 2000

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

AMENDED OPINION

MERRITT, Circuit Judge. In this case under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, plaintiff Ella Williams was transferred by the defendant auto manufacturer to the paint inspection section of the defendant's quality control operation in its Kentucky assembly plant because the manual tasks Williams had been performing on the assembly line using pneumatic tools had caused her to develop carpal tunnel syndrome and tendinitis in her hands and arms. Williams then spent approximately three years inspecting cars on the assembly line for defective paint and manually wiping down each newly painted car as it passed on the conveyor. Taking the facts in the light most favorable to the plaintiff, as we must when the district court has granted summary judgment for the defendant-employer, Williams' job duties were then expanded to include another job in the paint inspection section requiring her to grip a block of wood with a sponge attached to the end and wipe down the passing cars with a highlight oil at the rate of approximately one car per minute. In addition to gripping the block of wood, this new work required Williams to keep her hands and arms up around shoulder height repetitively over several hours. Her ligament and muscle problems reappeared in a more severe form as a result of the new job, with tendinitis now in her shoulders and neck as well. As a result, Williams asked her employer to assign her back to her former jobs within the paint inspection section. The employer refused according to Williams, but the employer disputes this fact. The central question in this case is whether the employer violated the ADA by refusing to accommodate Williams by allowing her to return to her former, less strenuous work within paint inspection. The district court granted summary judgment against the plaintiff primarily on the ground that she does not have a "disability," as defined in the Act, and therefore is not covered by the Act. The key issue before us is simply whether plaintiff's physical difficulties in using her hands, arms and shoulders, as required by her new job within paint inspection, constitute a

"disability." In other words, should Williams' inability to perform certain manual tasks bring her within the coverage of the Act. Williams also claims that the defendant violated the ADA by terminating her due to her disability. The district court found that Williams failed to make a prima facie case with respect to her wrongful termination claim, because Williams was completely restricted from doing any kind of work at the time of her termination and therefore could not be a qualified individual under the ADA.

The ADA is unclear as to when it should be applied to protect an employee, as the Supreme Court recently suggested in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L.Ed.2d 450 (1999). The Act provides that the employer may not "discriminate against a qualified individual with a disability because of the disability . . . in regard to . . . hiring, advancement, or discharge of employees, employees compensation, job training, and other terms . . . of employment." § 12112(a). The phrase "qualified individual with a disability" is defined as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8). In the crucial section in the litigation before us, the Act defines the word "disability" as follows:

> (A) A physical or mental impairment that *substantially limits one or more of the major life activities* of such individual;
>
> (B) A record of such impairment; or
>
> (C) Being regarded as having such an impairment.

§ 12102(2) (emphasis added).

The EEOC in its regulations interpreting the ADA and the Supreme Court in *Sutton* have said that the language in the definition of disability that the impairment in question must "substantially limit[ ] one or more of the major life activities" requires for the major life activity of "working" that the individual be unable to perform a class or broad range of

jobs. The analysis must be class based. "One must be precluded from more than one type of job," i.e., "a substantial class of jobs." *Sutton*, 119 S. Ct. at 2151. The plaintiff here asserts primarily that her impairments disable her from performing manual tasks,[1] a different disability from "working," the disability at issue in the *Sutton* case. It would appear, nevertheless from the language of the Act, the EEOC's interpretation and the Supreme Court's analysis in *Sutton* that in order to be disabled the plaintiff must show that her manual disability involves a "class" of manual activities affecting the ability to perform tasks at work.

In this case, taking the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling to allow the factfinder to find she crosses the threshold into the protected class of individuals under the ADA -who must be accorded reasonable accommodation. Her ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.

The fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not effect a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job. In addition, looking at all of the evidence most favorably to the plaintiff, the duration of Williams' impairment, as well as the expected permanent impact of it,

[1] Although Williams has also claimed that she is substantially limited in the major life activities of lifting and working, in addition to manual tasks, her counsel conceded during oral argument that Williams' strongest claim pertained to the major life activity of performing manual tasks.

are inferable from the permanent work restrictions prescribed by Williams' treating physicians. As a result, we conclude there is sufficient evidence to support a finding that Williams was substantially limited as to a major life activity and that the district court's grant of summary judgment for the defendant was inappropriate.

Because we conclude that Williams is substantially limited in performing manual tasks, we do not need to determine whether Williams is substantially limited as to the major life activities of lifting or working. Moreover, as to the major life activity of working, the case of *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir.1997), is distinguishable from the case at hand. *McKay* was decided before the Supreme Court recognized in Sutton that "there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." 119 S. Ct. at 2151 (internal citation omitted). The *Sutton* Court further noted that 'even the EEOC has expressed a reluctance to . . . include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.'" *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.20)) (emphasis in original).

In this case, the plaintiff's claim is not based solely on the difficult concept that she is disabled as to work generally, but rather, includes the rather simple concept that she is disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks that are job-related. Ultimately, *McKay* is distinguishable from this case for the same reason that *Sutton* is, in that these cases only turned on the "difficult concept" of working which is viewed as a "last resort." The concept of "manual tasks" requires a disability analysis to come before the life activity

of working is considered and includes looking at a person's ability to use their limbs in a way called for by a broad range or class of manual activities that, as in this case, require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time. Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally. The notion of "class" advocated by the *Sutton* Court can be based on a more limited concept than "working," and can be based on limits on manual activities which can affect other major life activities. Moreover, we believe Williams's impairment is more severe than the *McKay* plaintiff's, rendering, Williams "[s]ignificantly restricted as to the condition, manner or duration under which [she] can perform [manual tasks] as compared to the condition, manner, or duration under which the average person in the general population can perform [them]." 29 C. F. R. § 1630.2(j)(1)(ii).

Because we conclude that Williams has made the necessary showing under § 12102(2)(A) that she suffers from an actual impairment that substantially limits a major life activity to survive a motion for summary judgment, we need not address her claims that she was disabled because she had a record of a qualifying impairment, pursuant to § 12102(2)(B), or that, in the alternative, she was disabled because she was regarded as having such an impairment, pursuant to § 12102(2)(C). As to Williams's wrongful termination claim, however, we agree with the district court that, because Williams is restricted completely from working, she cannot claim to be a "qualified individual with a disability" within the meaning of the ADA; therefore, that claim must fail.

Although we have concluded that Williams is disabled and that there is a triable issue of fact as to whether the defendant auto manufacturer failed to reasonably accommodate her disability, it is important to note that Williams must still demonstrate the remainder of her prima facie case, and that the defendant is still free to raise any viable defenses as to

why it was unable to accommodate Williams, such as undue hardship and business necessity. To the extent that there is concern that employers may be required to answer in court "for every employment practice that draws distinctions based on physical attributes," nothing in this opinion should be construed to undermine an employer's ability to rely on an appropriate affirmative defense. Sutton, 119 S. Ct. at 2160 (Stevens, J., dissenting).

In regard to Williams's FMLA claim, we conclude that the district court properly granted summary judgment in favor of the defendant. The FMLA entitles an eligible employee with a serious health condition to 12 work weeks of unpaid medical leave, 29 U.S.C. § 2612(a)(1)(D), and if an employee's FMLA rights are violated, then they are entitled to recover certain damages. § 2617. On appeal, Williams does not dispute the defendant's claim that, assuming arguendo she was improperly denied FMLA leave, she has suffered no damages.[2] Williams has pointed to no economic benefits that she has lost from the denial of FMLA leave. In fact, Williams offered no evidence of any damages in her brief or at oral argument. Moreover, as the district court noted, Williams testified that on December 6, 1996, her last day of work at the assembly plant, she was placed under a no work of any kind restriction by one of her doctors and that she was still under this restriction nearly nine months after she stopped working at the assembly plant. Williams' contention on appeal that this fact is actually a matter of dispute is unpersuasive, as a review of Williams' deposition transcript reveals that she unequivocally stated that she was

[2] We do not decide whether 29 U.S.C. § 2617(a)(3), which grants attorney fees and costs to a successful plaintiff, applies to a case such as this one, where the plaintiff might be able to show a violation of the FMLA but cannot obtain a monetary judgment or injunctive relief. Although the district court addressed the applicability of § 2617(a)(3) in its memorandum opinion, the plaintiffs do not press this issue on appeal, and we therefore do not consider it.

restricted at the time of her termination and up until at least nine months later from doing any work of any kind, not even office jobs. Even if Williams was wrongfully terminated on January 27, 1997, within the 12-week period covered by the FMLA, she has failed to direct this court to any specific evidence supporting her claim that she was mistaken about her work restrictions when she gave her deposition and that she could have returned to work eventually. *Cf. Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934-36 (6th Cir.2000) (holding that an employee's inability to return to work within twelve weeks did not foreclose his FMLA claim, where he could have returned to work eventually and the employer failed to give notice that his FMLA leave time had begun to run.) Williams therefore cannot demonstrate that she was entitled to reinstatement under § 2617.

Accordingly, we REVERSE the district court's ruling as it pertains to the plaintiff's ADA claim for failure to accommodate and REMAND for further proceedings, but AFFIRM the district court's ruling on Williams's FMLA claim and her claim for wrongful termination.

BOGGS, Circuit Judge, concurring in part and dissenting, in part.

I concur in the court's judgment on the non-ADA portions of this case. I also agree with the court's citation of the Supreme Court in *Sutton* that "there may be some conceptual difficulty" in dealing with the definition of work as a "major life activity" in ADA cases. Slip op. at 5, *quoting Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139, 21519 144 L.Ed.2d 450. However, because I believe that the court's attempts to deal with this conceptual difficulty are flawed, I respectfully must dissent from its interpretation of the ADA.

The plaintiff in this case can do many things that would be considered "work" and many things that would be considered "manual tasks." At the same time, Ms. Williams has difficulty with some other activities that would fall into each category. Toyota had already accommodated Williams, after she had complained of some limitations, by assigning her to a

subset of the tasks generally performed by a worker in the paint inspection unit. Specifically, she was assigned two of the four jobs usually given to such a worker—inspecting the assembly and paint jobs and, as the court correctly notes, "manually wiping down each newly painted car." Toyota later asked her to perform a third job (though still not all four) of those jobs usually assigned to someone in her position. This new task also required her to "wipe down the passing cars," but apparently this wiping was performed with a tool requiring more gripping, and at a greater height than in her existing tasks.

This task caused Williams considerably more physical difficulty. Of course not every amount of physical difficulty with any one task will be considered a disability. As the court discerns, under *McKay* and under other decisions of this and other courts, this inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working. In particular, this court has held that the inability to perform a single, particular job does not constitute a substantial limitation on working. *See Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir.1997) (Kennedy, J., concurring in part and dissenting in part) (collecting cases); *Cf. Sullivan v. River Valley Sch. Dist., et al.*, 197 F.3d 804, 811 (6th Cir.1999) (holding that "a mere deterioration in performance at a single particular job cannot constitute a disability").

Therefore, the court decides to look instead to the major life activity of "performing manual tasks." *See* 29 C.F.R. § 1630.2(i). As does the concept of working, the activity of "performing manual tasks" raises the question just how much of a diminution in that ability constitutes a disability. Certainly the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping task that she already had been doing prior to her newest assignment. In addition, the record shows that she can perform the manual tasks of brushing her teeth, laundering her clothes, and doing some driving. In fact, as the court's opinion again correctly notes, Williams's

difficulty is almost exclusively with the inability to do manual tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Maj. op. at 842-43.

I see no citations in the court's opinion, either to regulations or to cases, indicating that such a specific and partial limitation is considered a disability with regard to the major life activity of "performing manual tasks." In one prior case in which a plaintiff with carpal tunnel syndrome claimed a substantial limitation in his ability to perform manual tasks, the claim was rejected because "plaintiff could work at Stage performing the manual tasks of slicing and chopping food, installing locks, and fixing various items at Stage for [only] eight hours per day . . . [which] type of impairment does not constitute a significant restriction on plaintiff's ability to perform manual tasks or any other major life activity." *Shpargel v. Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996), *citing McKay*, 878 F. Supp. 1012, 1014-15, *and Fink v. Kitzman*, 881 F. Supp. 1347, 1377 (N.D. Iowa 1995). Likewise, another plaintiff failed to present a triable issue on whether her carpal tunnel syndrome "substantially limits" the major life activity of caring for herself despite "the routine tasks that she must perform with adjustment, including: carry groceries only in light bags; carry laundry in small loads; obtain assistance to move furniture, open cans; properly make a bed. She cannot 'effectively' brush her teeth or hair and experiences discomfort in gripping the steering wheel while driving a car." *Terrell v. USAir, Inc.*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996), *citing Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir.1995), *aff'd*, 132 F.3d 621 (11th Cir.1998). Measuring Williams's limitation against plaintiffs claiming similar limitations on other major life activities, she does not appear disabled. If McKay, despite some diminution in ability, is not "substantially limit[ed]" from working, as that term is defined in 29 C.F.R. § 1630(2)(j)(1-3), I fail to see how Williams, who has some comparable diminution in performing manual tasks, *is* so limited. By defining the standard for a substantial limitation on "performing manual

tasks" far less stringently than the standards for "caring for oneself" and "working" have been defined, the court appears to undercut *McKay* and its progeny.

More importantly, it seems to me that if considering the concept of working is only a "last resort," the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to "perform manual tasks," and erroneously treats a partial limitation there as substantially limiting a major life activity. The court states that "the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work" in order to be disabled. Maj. op. at 843. This description of the plaintiff's burden in defeating summary judgment conflates (and erodes) the standards for demonstrating a substantial limitation on "working" and on "performing manual tasks." To defeat summary judgment as to the existence of a disability, Williams must demonstrate a genuine issue of material fact that her impairment substantially limits the major life activity of either "working" or "performing manual tasks." These are separate inquiries, as the court implicitly concedes in seeking to distinguish this case from *McKay*. Williams has not shown a substantial limitation in working, because the inability to perform a single, particular job is not a substantial limitation, and she has not demonstrated that there is a broader class of jobs from which her impairment disqualifies her. Nor has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks.

I therefore respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5234

ELLA WILLIAMS,
Plaintiff-Appellant,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky
Henry R. Wilhoit, Jr., Chief Judge, Presiding

Argued and Submitted February 1, 2000
Decided and Filed July 10, 2000

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

OPINION

MERRITT, Circuit Judge. In this case under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, plaintiff Ella Williams was transferred by the defendant auto manufacturer to the paint inspection section of the defendants quality control operation in its Kentucky assembly plant because the manual tasks Williams had been performing on the assembly line using pneumatic tools had caused her to develop carpal tunnel syndrome and tendinitis in her hands and arms. Williams then spent approximately three years inspecting cars on the assembly line for defective paint and manually wiping down each newly painted car as it passed on the conveyor. Taking the facts in the fight most favorable to the plaintiff, as we must when the district court has granted summary judgment for the defendant-employer, Williams's job duties were then expanded to include another job in the paint inspection section requiring her to grip a block of wood with a sponge attached to the end and wipe down the passing cars with a highlight oil at the rate of approximately one car per minute. In addition to gripping the block of wood, this new work required Williams to keep her hands and arms up around shoulder height repetitively over several hours. Her ligament and muscle problems reappeared in a more severe form as a result of the new job, with tendinitis now in her shoulders and neck as well. As a result, Williams asked her employer to assign her back to her former jobs within the paint inspection section. The employer refused according to Williams, but the employer disputes this fact. The central question in this case is whether the employer violated the ADA by refusing to accommodate Williams by allowing her to return to her former, less strenuous work within paint inspection. The district court granted summary judgment against the plaintiff primarily on the ground that she does not have a "disability," as defined in the Act, and therefore is not covered by the Act. The key issue before us is simply whether plaintiff's physical difficulties in using her hands, arms and shoulders, as required by her new job within paint inspection, constitute a "disability." In other words, should Williams's inability to

perform certain manual tasks bring her within the coverage of the Act.

The ADA is unclear as to when it should be applied to protect an employee, as the Supreme Court recently suggested in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct 2139 (1999). The Act provides that the employer may not "discriminate against a qualified individual with a disability because of the disability . . . in regard to . . . hiring, advancement, or discharge of employees, employees compensation, job training, and other terms . . . of employment." § 12112(a). The phrase "qualified individual with a disability" is defined as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8). In the crucial section in the litigation before us, the Act defines the word "disability" as follows:

> (A) A physical or mental impairment that *substantially limits one or more of the major life activities* of such individual;
>
> (B) A record of such impairment; or
>
> (C) Being regarded as having such .m impairment.

§ 12102(2) (emphasis added).

The EEOC in its regulations interpreting the ADA and the Supreme Court in *Sutton* have said that the language in the definition of disability that the impairment in question must "substantially limit[] one or more of the major life activities" requires for the major life activity of "working" that the individual be unable to perform a class or broad range of jobs. The analysis must be class based. "One must be precluded from more than one type of job," i.e., "a substantial class of jobs." *Sutton*, 119 S.Ct. at 2151. The plaintiff here asserts primarily that her impairments disable

her from performing manual tasks,[1] a different disability from "working," the disability at issue in the *Sutton* case. It would appear, nevertheless from the language of the Act, the EEOC's interpretation and the Supreme Court's analysis in *Sutton* that in order to be disabled the plaintiff must show that her manual disability involves a "class" of manual activities affecting the ability to perform tasks at work.

In this case, taking the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling to allow the factfinder to find she crosses the threshold into the protected class of individuals under the ADA who must be accorded reasonable accommodation. Her ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.

The fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not effect a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job. In addition, looking at all of the evidence most favorably to the plaintiff, the duration of Williams's impairment, as well as the expected permanent impact of it, are inferrable from the permanent work restrictions prescribed by Williams's treating physicians. As a result, we conclude there is sufficient evidence to support a finding that Williams was substantially limited as to a major life activity

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[1] Although Williams has also claimed that she is substantially limited in the major life activities of lifting and working, in addition to manual tasks, her counsel conceded during oral argument that Williams's strongest claim pertained to the major life activity of performing manual tasks.

and that the district court's grant of summary judgment for the defendant was inappropriate.

Because we conclude that a trial on the merits is necessary on Williams's ADA claim, we do no need to determine whether Williams is substantially limited as to the major life activities of lifting or working. Moreover, as to the major life activity of working, the case of *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997), is distinguishable from the case at hand. *McKay* was decided before the Supreme Court recognized in *Sutton* that "there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." 119 S.Ct. at 2151 (internal citation omitted). The *Sutton* Court further noted that "even the EEOC has expressed a reluctance to . . . include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.'" *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.20(j) (emphasis in original).

In this case, the plaintiff's claim is not based solely on the difficult concept that she is disabled as to work generally, but rather, includes the rather simple concept that she is disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks that are job-related. Ultimately, *McKay* is distinguishable from this case for the same reason that *Sutton* is, in that these cases only turned on the "difficult concept" of working which is viewed as a "last resort." The concept of "manual tasks" requires a disability analysis to come before the life activity of working is considered and includes looking at a person's ability to use their limbs in a way called for by a broad range or class of manual activities that, as in this case, require the gripping of tools and arms to be kept overhead or at shoulder

level repetitively for an extended period of time. Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally. The notion of "class" advocated by the Sutton Court can be based on a more limited concept than "working," and can be based on limits on manual activities which can affect other major life activities. Moreover, we believe Williams's impairment is more severe than the *McKay* plaintiff's, rendering Williams "[s]ignificantly restricted as to the condition, manner or duration under which (she] can perform [manual tasks] as compared to the condition, manner, or duration under which the average person in the general population can perform [them]." 29 C.F.R. § 1630-20)(1)(ii).

Because we conclude that Williams has made the necessary showing under § 12102(2)(A) that she suffers from an actual impairment that substantially limits a major life activity to survive a motion for summary judgment, we need not address her claims that she was disabled because she had a record of a qualifying impairment, pursuant to § 12102(2)(B), or that, in the alternative, she was disabled because she was regarded as having such an impairment, pursuant to § 12102(2)(C). Moreover, as to Williams's wrongful termination claim, if at trial it is found that she was in fact disabled, then her wrongful termination claim survives to the extent that she can establish either that she was terminated because of her disability or that her termination flowed from the defendant's wrongful failure to reasonably accommodate her.

Although we have concluded that there is a triable issue of fact as to whether Williams was disabled and as to whether the defendant auto manufacturer failed to reasonably accommodate her disability, it is important to note that the defendant is still free to raise any viable defenses as to why it was unable to accommodate Williams, such as undue hardship and business necessity. To the extent that there is concern that employers may be required to answer in court "for every employment practice that draws distinctions based

on physical attributes," nothing in this opinion should be construed to undermine an employer's ability to rely on an appropriate affirmative defense. *Sutton*, 119 S.Ct. at 2160 (Stevens, J., dissenting).

In regard to Williams's FMLA claim, we conclude that the district court properly granted summary judgment in favor of the defendant. The FMLA entities an eligible employee with a serious health condition to 12 work weeks of unpaid medical leave, 29 U.S.C. § 2612(a)(1)(D), and if an employee's FMLA rights are violated, then they are entitled to recover certain damages. § 2617. On appeal, Williams does not dispute the defendant's claim that, assuming *arguendo* she was improperly denied FMLA leave, she has suffered no damages. [2] Williams has pointed to no economic benefits that she has lost from the denial of FMLA leave. In fact, Williams offered no evidence of any damages in her brief or at oral argument. Moreover, as the district court rioted, Williams testified that on December 6, 1996, her last day of work at the assembly plant, she was placed under a no work of any kind restriction by one of her doctors and that she was still under this restriction nearly nine months after she stopped working at the assembly plant. Williams's contention on appeal that this fact is actually a matter of dispute is unpersuasive, as a review of Williams's deposition transcript reveals that she unequivocally stated that she was restricted at the time of her termination and up until at least nine months later from doing *any work of any kind,* not even office jobs. Even if Williams was wrongfully terminated on January 27, 1997, within the 12-week period covered by the FMLA, she has failed to direct this court to any specific evidence supporting her claim that she was mistaken about

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[2] We do not decide whether 29 U.S.C. § 2617(a)(3), which grants attorney fees and costs to a successful plaintiff, applies to a case such as this one, where the plaintiff might be able to show a violation of the FMLA but cannot obtain a monetary judgment or injunctive relief. Although the district court addressed the applicability of § 2617(a)(3) in its memorandum opinion, the plaintiffs do not press this issue on appeal, and we therefore do not consider it.

her work restrictions when she gave her deposition and that she could have returned to work eventually. *Cf. Plant v. Morton Int'l, Inc.*, -- F.3d --, 2000 WL 572458, at *4-5 (6th Cir. May 12, 2000) (holding that an employee's inability to return to work within twelve weeks did not foreclose his FMLA claim, where he could have returned to work eventually and the employer failed to give notice that his FMLA leave time had begun to run). Williams therefore cannot demonstrate that she was entitled to reinstatement tinder § 2617.

Accordingly, we REVERSE the district court's ruling as it pertains to the plaintiff's ADA claims and REMAND for a trial on the merits, but AFFIRM the district court's ruling on her FMLA claim.

BOGGS, Circuit Judge, concurring in part and dissenting in part. I concur in the court's judgment on the non-ADA portions of this case. I also agree with the court's citation of the Supreme Court in Sutton that "there may be some conceptual difficulty" in dealing with the definition of work as a "major life activity" in ADA cases. Slip op. at 5, *quoting Sutton v. United Airlines,* 119 S. Ct. 2139, 2151. However, because I believe that the courts attempts to deal with this conceptual difficulty are flawed, I respectfully must dissent from its interpretation of the ADA.

The plaintiff in this case can do many things that would be considered "work" and many things that would be considered "manual tasks." At the same time, Ms. Williams has difficulty with some other activities that would fall into each category. Toyota had already accommodated Williams, after she had complained of some limitations, by assigning her to a subset of the tasks generally performed by a worker in the paint inspection unit. Specifically, she was assigned two of the four jobs usually given to such a worker—inspecting the assembly and paint jobs and, as the court correctly notes, "manually wiping down each newly painted car." Toyota later asked her to perform a third job (though still not all four) of those jobs usually assigned to someone in her position. This new task also required her to "wipe down the

passing cars," but apparently this wiping was performed with a tool requiring more gripping, and at a greater height than in her existing tasks.

This task caused Williams considerably more physical difficulty. Of course not every amount of physical difficulty with any one task will be considered a disability. As the court discerns, under *McKay* and under other decisions of this and other courts, this inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working. In particular, this court has held that the inability to perform a single, particular job does not constitute a substantial limitation on working. *See Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) (collecting cases); *Cf. Sullivan v. River Valley Sch. Dist., et al.*, 197 F.3d 804, 811 (6th Cir. 1999) (holding that "a mere deterioration in performance at a single, particular job cannot constitute a disability").

Therefore, the court decides to look instead to the major life activity of "performing manual tasks." *See* 29 C.F.R. § 1630.2(i). As does the concept of working, the activity of "performing manual tasks" raises the question just how much of a diminution in that ability constitutes a disability. Certainly the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping task that she already had been doing prior to her newest assignment. In addition, the record shows that she can perform the manual tasks of brushing her teeth, laundering her clothes, and doing some driving. In fact, as the court's opinion against correctly notes, Williams's difficulty is almost exclusively with the inability to do manual tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Slip op. at 4.

I see no citations in the court's opinion, either to regulations or to cases, indicating that such a specific and partial limitation is considered a disability with regard to the major life activity of "performing manual tasks." In one

prior case in which a plaintiff with carpal tunnel syndrome claimed a substantial limitation in his ability to perform manual tasks, the claim was rejected because "plaintiff could work at Stage performing the manual tasks of slicing and chopping food, installing locks, and fixing various items at Stage for [only] eight hours per day . . . [which] type of impairment does not constitute a significant restriction on plaintiff's ability to perform manual tasks or any other major life activity." *Sheargel v. Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996), *citing McKay*, 878 F. Supp. 10 12, 1014-15, *and Fink v. Kitzman*, 881 F. Supp. 1347, 1377 (N.D. Iowa 1995). Likewise, another plaintiff failed to present a triable issue on whether her carpal tunnel syndrome "substantially limits" the major life activity of caring for herself despite "the routine tasks that she must perform with adjustment, including: carry groceries only in light bags; carry laundry in small loads; obtain assistance to move furniture, open cans; properly make a bed. She cannot 'effectively' brush her teeth or hair and experiences discomfort in gripping the steering wheel while driving a car." *Terrell v. USAir, Inc.*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996), *citing Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995), *aff'd*, 132 F.3d 621 (11th Cir. 1998). Measuring Williams's limitation against plaintiffs claiming similar limitations on other major life activities, she does not appear disabled. If McKay, despite some diminution in ability, is not "substantially limit[ed]" from working, as that term is defined in 29 C.F.R. § 1630(2)(j)(1-3), I fail to see how Williams, who has some comparable diminution in performing manual tasks, *is* so limited. By defining the standard for a substantial limitation on "performing manual tasks" far less stringently than the standards for "caring for oneself' and "working" have been defined, the court appears to undercut *McKay* and its progeny.

More importantly, it seems to me that if considering the concept of working is only a "last resort," the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to "perform manual tasks," and

erroneously treats a partial limitation there as substantially limiting a major life activity. The court states that "the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work" in order to be disabled. Slip op. at 4. This description of the plaintiff's burden in defeating summary judgment conflates (and erodes) the standards for demonstrating a substantial limitation on "working" and on "performing manual tasks." To defeat summary judgment as to the existence of a disability, Williams must demonstrate a genuine issue of material fact that her impairment substantially limits the major life activity of either "working" or "performing manual tasks." These are separate inquiries, as the court implicitly concedes in seeking to distinguish this case from *McKay*. Williams has not shown a substantial limitation in working, because the inability to perform a single, particular job is not a substantial limitation, and she has not demonstrated that there is a broader class of jobs from which her impairment disqualifies her. Nor has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks.

I therefore respectfully dissent.

APPENDIX C

[Filed January 26, 1999]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-135

ELLA WILLIAMS,
Plaintiff.

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant.

MEMORANDUM & ORDER

This matter is before the Court on Defendant's motion for summary judgment [Record No. 99], Plaintiff's motion for partial summary judgment [Record No. 103], and two motions in limine filed by the Defendant [Record Nos. 96 and 147]. For the reasons stated below, Defendant's motion for summary judgment is granted. Consequently, the remaining motions are denied as moot.

I. Introduction

In April of 1997, Ella Williams filed a complaint against her former employer, Toyota Motor Manufacturing, Kentucky, Inc. ("TMMK") for alleged violations of Title I of the Americans with Disabilities Act, Title 42 U.S.C. §12101 *et seq.* ("ADA"), and the Kentucky Civil Rights Act, KRS Chapter 344. Later, Plaintiff amended her complaint to

include a count pursuant to the Family and Medical Leave Act, Title 29 U.S.C. § 2601 *et seq*. ("FMLA").

Defendant's motion for summary judgment seeks to dispose of Plaintiff s entire case. Plaintiff, on the other hand, has filed a motion for partial summary judgment addressing only her claims under the ADA. Plaintiff's ADA case charges the Defendant with two distinct acts of discrimination—a failure to provide reasonable accommodations and Plaintiff's ultimate termination from employment. Defendant's motion maintains that Plaintiff has failed to demonstrate a prima facie case of discrimination in that at no relevant time period did Plaintiff suffer from a disability or, in the alternative, that Plaintiff is not an otherwise qualified individual. Regarding Plaintiff's claim under the FMLA, Defendant argues that it too must fail as Plaintiff has failed to allege any injuries or damages that are cognizable under that statute. On the other hand, Plaintiff's motion for partial summary judgment seeks judicial determination that she suffers from a disability, was otherwise qualified, and that Defendant discriminated against her because of her disability.

II. Factual Background

Located in Georgetown, Kentucky, TMMK manufacturers automobiles and employees more than 7,500 people. In August of 1990, Plaintiff began her employment with TMMK and was first assigned to the company's Paint and Powertrain Department. Later, Plaintiff was permanently positioned on the assembly line where her duties included building car engines. Unfortunately, however, prolonged use of pneumatic tools in this position proved to be physically too demanding, and she was soon diagnosed with bilateral carpal tunnel syndrome and bilateral tendinitis by Defendant's in-house medical service, Industrial Health Services ("IHS").[1] Plaintiff began seeing Dr. James Kleinert.

[1] Industrial Health Services is a Kentucky corporation that provides occupational medicine services to TMMK. Occupational medicine is a specialty of medicine which deals with industrial

While it was Dr. Kleinert's belief that Plaintiff could continue working at TMMK, he placed permanent restrictions on her which precluded her from lifting twenty pounds maximum with frequent lifting or carrying objects weighing up to ten pounds; no constant repetitive use of both hands/arms, flexion/extension of the wrists/elbows, pinching/gripping, pushing/pulling; and no use of pneumatic or vibratory tools. These restrictions were then communicated to TMMK.

For the next couple of years, TMMK assigned Plaintiff to various "modified duty" jobs. However, Plaintiff soon became dissatisfied with her employer's response to the restrictions imposed by Dr. Kleinhert. Specifically, she felt as though TMMK was not providing her reasonable accommodations in that she was being assigned work which she believed fell outside her work restrictions. Accordingly, Williams filed a claim under Kentucky Workers' Compensation Act, which was eventually settled. Thereafter, she returned to work at TMMK but was again disappointed in her employer's willingness to accommodate her restrictions. Therefore, on June 10, 1993, Williams brought an action against TMMK in this Court alleging violations of the ADA. That suit too was settled and, as a part of that settlement, Williams returned to work at TMMK in December of 1993.

Upon her return, TMMK placed Plaintiff on a team in Quality Control Inspection Operations ("QCIO"), also known as Body Paint and Paint Inspection. Teams working in QCIO are responsible for four jobs or processes: (1) Assembly Paint ("assembly"); (2) Paint Second Inspection ("paint inspection"); (3) Shell Body Audit ("body shop inspection"); and (4) ED Surface Repair ("ED inspection"). These jobs are not typical production line positions. They require less physical activity and are known to Defendant's employees as the "easiest jobs" at TMMK. Plaintiff was initially placed in

and environmental safety medicine and the treatment of conditions that are derived from those environments. IHS refers nonoccupational problems to outside, private physicians.

Team 2, the team that performed both assembly and paint inspection. For at least the first couple of years, Plaintiff was rotated on a weekly basis between assembly and paint inspection. It is undisputed that Williams was physically capable of performing these jobs and that her actual performance was satisfactory. In fact, she received good evaluations from TMMK during this time.

In assembly, Williams was charged with the responsibility of visually inspecting painted cars which are moving slowly down a conveyor. Employees scan for scratches, dents, chips, or any other flaws that may have occurred during the assembly or paint process. On average, one car passes every 54 seconds. When Plaintiff began working in assembly, inspection required team members to open and shut the doors, trunk, and/or hoods of each passing car. Sometime during Plaintiff's tenure, however, the position was modified and became essentially a point in which each car was visually scanned for flaws with little or no manual tasks. The paint inspection process was a little more involved physically. Here, team members, using a ramp, positioned themselves in such a way as to be able to use their hands to manually wipe down each painted car as it moved along on the conveyor.

During the fall of 1996, Plaintiff was told by her Group Leader, Asa Crane, that Kendall Hall, a new assistant manager, eventually wanted team members to be able to rotate through all four of the QCIO processes. Recognizing this as an opportunity to become a better team member, and perhaps boost her chances of being promoted, Williams embraced the idea of being cross-trained on more jobs. She communicated her desire to Asa Crane who, through the assistance of IHS, determined that cross-training Williams on the body shop inspection process would pose no difficulty in light of Plaintiff's then existing work restrictions.

Plaintiff began training on the body shop inspection process sometime in late September or early October of 1996, and although it was a little more physically demanding than Plaintiff's previous QCIO jobs, she completed her training without difficulty. Team members in body paint

inspection, a pre-paint process, are required to apply a highlight oil on the hood, the fender, the doors, the rear quarter panel, hood and trunk of passing cars. The oil has a viscosity similar to salad oil, and is applied by spreading it on the car with a sponge attached to a block of wood. Having wiped the car down, the body paint employee simply visually inspects the passing car.

After working this position for only a short while, with weekly rotations back to either paint inspection and/or assembly, Plaintiff found that the increased physical activity, i.e., gripping the sponge handle, wiping the car with the oil, and the height of the car, was causing her great pain in the neck and shoulder area. As a result, Plaintiff saw Dr. Pradeep Bose, a physician in IHS. Dr. Bose diagnosed Plaintiff as having myotendonitis bilateral periscapulr, an inflammation of the muscles and tendons around both of her shoulder blades, myotendonitis and myositis bilateral forearms with nerve compression causing media nerve irritations, and thoracic outlet compression, a condition that causes pain in the nerves that lead to the upper extremities. Given this diagnoses, Plaintiff advised Crane that she was physically unable to work the body shop inspection job and that her placement there was possibly in violation of her work restrictions. Crane expressed Williams' concerns to IHS and TMMK's Human Resources Department, who evaluated the body paint inspection job and again concluded that it fell within Plaintiff's work restrictions. However, having come to the conclusion that she could not physically perform the duties of body paint inspection, Plaintiff offered to TMMK what she envisioned as a reasonable accommodation—allow her to return to her original two jobs in assembly and paint inspection, processes the Plaintiff always maintained that she could perform without difficulty. Or, in the alternative, that if she must be cross-trained on another QCIO process to allow it to be the ED inspection job, a much less strenuous position.

What followed next is disputed between the parties. According to Plaintiff, TMMK refused her request for a

change in her rotation and forced her to continue working the body paint inspection job for several weeks before it eventually caused her greater physical injury. On the other hand, Defendant's position seems to be that they were unable to accommodate Plaintiff's request because Williams only worked the body paint inspection job for one week. According to the Defendant, after Plaintiff spent one week in body paint inspection, she was rotated back to her original two positions and began missing a substantial amount of work. One thing, however, is clear and at least partially dispositive: on December 6, 1996, the last day Plaintiff worked at TMMK, she was placed under a *no work of any kind* restriction by several of her treating physicians. She never worked at TMMK again and, on January 27, 1997, Joetta Gay, TMMK's Assistant Manager of Employee Relations, sent Williams a letter announcing her termination and citing her poor attendance record.

III. Summary Judgement Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Under Rule 56 the Court must view the evidence in the light most favorable to the nonmoving party. Thus, when examining the record all doubts and inferences must be construed in favor of the nonmoving party in an effort to determine if any genuine issues of material fact exist.

However, in a series of decisions commonly referred to as the "trilogy," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1996); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court lowered the movant's burden on a summary judgment motion. According to the Court, Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 322. Applying this new standard, the Sixth Circuit has developed a series of principles that are applied to motions for summary judgment. Among them, is the notion that a respondent cannot merely rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

IV. Americans with Disabilities/Kentucky Civil Rights Act

Title I of the ADA prohibits an employer from discriminating against an otherwise qualified individuals with a disability simply because of such disability. *See* 42 U.S.C. § 12112(a) (1995). The Act works to preclude discrimination in all areas of employment including the application process, advancement, job training, discharge and other such terms, conditions, and privileges of employment. *See id.* Unlike its other federal civil rights counterparts, discrimination under the ADA includes the failure of an employer to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," § 12112(b)(5)(A), unless the employer can show that the "accommodation would impose an undue hardship on the operation of [its] business." *Id.*

In the absence of direct evidence, claims under the ADA, and the Kentucky Civil Rights Act,[2] are analyzed through the burden shifting mechanism first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and further refined in *Texas Dep't of Community Affairs v. Burdine*, 450

[2] Because the Kentucky Civil Rights Act is to be construed consistently with the ADA, *see Hall v. Transit Authority*, 883 S.W.2d 984 (Ky. App. 1994), resolution of Plaintiff's federal claim is dispositive of her civil rights claim under Kentucky state law. *See also Brohm M.D. v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir. 1998).

U.S. 248 (1981). Briefly, this now familiar framework places an initial burden on the plaintiff to demonstrate by a preponderance of the evidence a prima facie case of discrimination. Once achieved, an inference of discrimination arises which can be rebutted by the defendant upon a showing of some legitimate, non-discriminatory reason(s) for its challenged action. Of course, if a plaintiff is unable to establish a prima facie case, no presumption arises and the inquiry ceases. However, if an inference of discriminatory intent is established and properly rebutted by the defendant, the burden returns to the plaintiff to prove that the defendant's proffered explanation is merely a pretext for intentional discriminatory behavior. "While the burden of production shifts back and forth between the parties under the *McDonnell Douglas* framework, the ultimate burden of proving that the employer discriminated against the employee on account of his or her disability remains at all times with the employee." *Smith v. Chrysler Corp.*, 1998 WL 609781, at *5 (6th Cir. (Mich.)). The Plaintiff has not charged, and the record does not reveal, any direct evidence of discrimination. Accordingly, in order to withstand Defendant's motion for summary judgment, Plaintiff must utilize the *McDonnell Douglas* framework, and is charged with the task of coming forth with her prima facie case.

A. Failure to Accommodate.

Establishing a prima facie case under the ADA requires a plaintiff to show that—(1) she is an individual with a disability; (2) she is otherwise qualified for the job; and (3) that the defendant either refused to make a reasonable accommodation for her disability or made an adverse employment decision regarding her because of her disability. *See Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997). Plaintiff' s prima facie case is conducted one step at a time, and failure to produce sufficient evidence at any stage of the process must result in dismissal of her case. *See EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997).

Initially, a plaintiff is required to show, by a preponderance of the evidence, that she suffers from a disability. *See*

Cassidy v. Detroit Edison Co., 138 F.3d 629, 633 (6th Cir. 1998) ("Disability is the threshold requirement to claim discrimination under the ADA."). Consistent with other federal civil rights legislation that work to curb discrimination against the disabled, the ADA provides three avenues by which a claimant may demonstrate her disabled status. First, a plaintiff may show the existence of a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." § 12102(2)(A). Alternatively, one may be deemed disabled if she can show she "has a record of such an impairment," § 12102(2)(B), or that she is "being regarded as having such an impairment." § 12102(2)(C). Each definition stands independently of the other two, and satisfaction of one is all the ADA requires.

The plain text of the ADA does not refine in greater detail the above definitions. However, pursuant to § 12116, the Equal Employment Opportunity Commission has promulgated regulations designed to implement Title I of the ADA, and serve as useful guidance in the construction and interpretation of its terms. *See Bragdon v. Abbott*, 118 S.Ct. 2196, 2207 (1998) (in construing the ADA, the Court recognized "that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may property resort for guidance"). Further instruction may properly come from the Rehabilitation Act of 1973 and its implementing regulations which define "handicapped individual" in exactly the same manner as the ADA defines "disability." *See id.* at 2202.

As noted, one way a claimant can prove she is disabled under the Act is to show she suffers from a physical or mental impairment that substantially limits one or more of her major life activities. Courts and federal regulations interpreting this definition have dissected it into three distinct inquiries: physical or mental impairment, substantially limits and major life activities. *See* 29 CFR pt. 1630, App. p. 346-7 (1998); *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998)

(determination of plaintiff's status as a disabled individual was conducted in a three part manner). The first step is to ascertain whether a plaintiff's condition constitutes an impairment. According to the regulations, a physical or mental impairment includes "[a]ny physiological disorder, or conditions, . . . affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 CFR § 1630.2(h)(1). Typically, this requirement is met without difficulty and exists primarily to foreclose the protections of the ADA from those who believe they are impaired because of some physical/mental characteristic that does not derive from a physiological disorder (i.e., eye or hair color, lefthandedness, and/or a quick temper). *See* 29 CFR pt. 1630, App. p. 347.

Next, a plaintiff must show that her impairment interferes with one or more of her major life activities. Major life activities mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR § 1630.2(i). Rather than presenting an exhaustive list of what are and what are not major life activities, the intent of the phrase is to encompass "those basic activities that the average person in the general population can perform with little or no difficulty." 29 CFR pt. 1630, App. p. 347. For example, sitting, standing, lifting and reaching are also regarded as major life activities. *Id.*

Recognition of an impairment and the identification of a major life activity, or activities, set the stage for the third step of the disability inquiry. Because "[m]any impairments do not impact an individual's life to the degree that they constitute disabling impairments," *id.*, the ADA requires a plaintiff to set forth sufficient evidence that her impairment substantially limits on or more of her named major life activities. Certainly, this requirement is satisfied if the impairment renders the claimant completely "[u]nable to perform a major life activity that the average person in the

general population can perform." 29 CFR § 1630.2(j)(1)(i). However, it may also be met if the impairment leaves the claimant "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Id.* § 1630.2(j)(1)(ii). Given these standards, the regulations point to three factors that should be considered in determining whether an impairment substantially limits any major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *See id.* § 1630.2(j)(2)(i)-(iii).

When the major life activity in question is that of working, the regulations provide both a different standard as well as additional factors that should be taken into account. Here, a claimant houses the responsibility of showing that her impairment significantly restricts her from performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* § 1630.2(j)(3)(i). Whether satisfaction of this burden is achieved is guided not only by the factors mentioned above—the nature, severity and duration of the impairment and its expected long term impact—but also by consideration of the following: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the

impairment (broad range of jobs in various classes). *See* §1630.2(j)(3)(ii)(A)-(C).

Williams relies primarily upon §12102(2)(A) in an attempt to satisfy the threshold burden of showing she suffers from a disability. While she also seeks standing under § 12102(2)(B) and (C), having a record of disability and being regarded as disabled respectively, her reliance on these latter provisions is not nearly as great. Consequently, review of §12102(2)(B) and (C), and what they require, is temporarily postponed and will be left to later discussion.

(1) Plaintiff's Status as an Individual with a Disability; § 12101(2)(A)

As noted previously, Plaintiff has charged TMMK with two distinct acts of discrimination—a failure to accommodate her request for transfer, which occurred sometime during the Fall of 1996, and the Defendant's eventual termination of her employment in January of 1997. Because determining whether an individual is disabled requires examination of the claimant's condition at the time of the challenged discriminatory action, *see Kocsis v. Multi-Care Management*, 97 F.3d 876,884 (6th Cir. 1996), the first question is whether Williams' impairment, as it existed in the Fall of 1996, substantially limited one or more of her major life activities.

There is no doubt, and the parties do not dispute, that in the Fall of 1996 Williams suffered from a physical impairment. She has presented sufficient evidence of these impairments and has therefore met her burden in this regard.

Next, Plaintiff claims that the following non-work major life activities were substantially limited by her physical impairments during the Fall of 1996: (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; and (5) lifting.[3] While the regulations make no reference to

[3] When a plaintiff claims that her impairment substantially limits major life activities other than working, her claims with regard to the non-work major life activities should be considered first. *See* 29 CFR pt. 1630, App. p. 349 (1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998).

housework, gardening or playing with children, the performance of manual tasks and lifting are specifically mentioned and are, therefore, considered major life activities as a matter of law. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 642 (2d Cir. 1998). As to housework, gardening and playing with her children, the simple fact that these activities are not specifically mentioned in the regulations does not preclude their status as major life activities. *See Bragdon v. Abbott*, 118 S.Ct. 2196, 2205 (1998) (recognizing that the definition of "major life activities" under the ADA and the Rehabilitation Act is illustrative and not exhaustive). Rather, the Court must determine on its own whether or not they rise to the level of major life activities.

In *Bragdon* the Court, quoting the appellate court below, stated that "the plain meaning of the word 'major' denotes comparative importance and suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Id.* While activities such as gardening and doing housework may indeed be important to Ms. Williams, that is not the question presented. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 642 (2d Cir. 1998)("In deciding whether a particular activity is a 'major life activity,' we ask whether that activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff."). Instead, the question is whether these activities are so significant that they are deemed major life activities as contemplated by the ADA. When compared to activities such as walking, seeing, hearing, speaking and breathing, the Court cannot find that gardening, housework, playing with, or otherwise recreating with others, are such significant activities to warrant their inclusion into the "statutory rubric" of major life activities. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998)(holding that gardening and housework are not a major life activities as contemplated by the ADA); *Weaver*

v. Florida Power & Light, 1996 WL 479117, *7 (S.D. Fla.)(holding that playing sports with plaintiff's children not a major life activity).

Having narrowed the inquiry, the next question is whether Plaintiff's physical impairment substantially limited her major life activities of performing manual tasks, lifting and/or working. With regards to the major life activity of performing manual tasks, Plaintiff's evidence is that she "has been restricted by both the IHS doctors and her personal doctor from performing manual tasks that require repetitive movement of her upper extremities or any work that must be performed above her chest level." (Plaintiff's Motion for Partial Summary Judgment, at 16). In addition, she is "precluded from any manual task that requires rotary or lateral movements of her head and neck. . . ." (Plaintiff's Motion for Partial Summary Judgment, at 16).

While these statements are intended to characterize Plaintiff as one who is perhaps completely "[u]nable to perform a major life activity that the average person in the general population can perform," 29 CFR §1630.2(j)(1)(i), they are irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks. In fact, during the relevant time period, Plaintiff's proposed reasonable accommodation was to be reassigned to assembly and paint inspection. Finally, Plaintiff has failed to present any evidence regarding the nature and severity of Plaintiff's impairment, the duration or expected duration of her impairment, or the permanent or long term impact resulting from the impairment. *See id.* § 1630.2(j)(2). Absent such evidence, no rational juror could conclude that Williams is substantially limited in her ability to perform manual tasks.

Plaintiff's assertion that she is substantially limited in her ability to lift fails for similar reasons. The only evidence presented on this issue is as follows: "Ms. Williams is also restricted by her doctors in her lifting . . . . Her 1993 restrictions prevent her from lifting more than 20 pounds, or

more than 10 pounds frequently." (Plaintiff's Motion for Partial Summary Judgment, at 16). Again, without the presentation of evidence sufficient to allow this Court to make a determination in conformity with the applicable regulations—for example, as to the duration and expected long term impact of Plaintiff's lifting restrictions—no rational juror could conclude that Plaintiff's ability to lift is substantially limited. *See Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998) (holding that "a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA"). Moreover, other circuits have concluded that physician imposed lifting restrictions similar to those imposed upon Williams, do not amount to a substantial limitation of the major life activity of lifting. *See e.g., Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *Gibbs v. St. Anthony Hosp.*, 107 F.3d 20, 1997 WL 57156 (10th Cir. (Okla.)); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997) (holding as a matter of law that a 20-pound lifting limitation does not significantly restrict major life activities); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (same); *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996) (same); *Vaughan v. Harvard Indus., Inc.*, 926 F.Supp. 1340, 1346 (W.D. Tenn. 1996) (citing district court cases analyzing restrictions from 10 to 25 pounds).

Finally, Plaintiff claims that her physical impairment substantially limited her ability to work. In order to defeat Defendant's motion for summary judgment, Plaintiff must show more than an inability to perform a single job or the job of her choice. *See Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998) (holding that "it is not enough for the plaintiff to show that her impairment prevent[s] her from performing one narrow job for one employer"); *Gilday v. Mecosta Co.*, 124 F.3d 760, 767 (6th Cir. 1997) ("The inability to perform a particular job or the job of one's choice is not a disability."). Moreover, she must show more than an inability to perform a narrow range of jobs. *See McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 373 (6th Cir. 1997) (Kennedy, J., concurring) (refusing to find plaintiff

substantially limited in major life activity of working where evidence showed only that she was precluded from a narrow range of jobs). Rather, Williams must demonstrate that her impairment significantly restricted her from performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR § 1630.2(j)(3)(i). In light of this standard, Williams has failed to produce sufficient evidence to allow a rational juror to conclude, by a preponderance of the evidence, that she is substantially limited in the major life activity of working.

Other than her claimed inability to perform the essential functions of the body paint inspection process, Williams has offered the testimony of Dr. William J. Weikel, Ph.D., a vocational expert from Morehead, Kentucky, in an attempt to show that her impairment substantially limited her major life activity of working. Dr. Weikel's report states that because of her condition, the number of jobs in the economy that Williams can perform has been reduced by 50% to 55%. (Plaintiff's Motion for Partial Summary Judgment, at 16). By way of explanation, Dr. Weikel attributed 40% to Williams' inability to perform medium duty work, and the remaining 10% to 15% to her loss of access to light duty jobs in the economy. Although this is more evidence than the Plaintiff has produced with respect to her other major life activities, it is still inadequate.[4]

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[4] Plaintiff also maintains that the working restrictions imposed by Dr. Kleinert restricted her ability to work. While this may be so, Plaintiff has not so shown. In her motion for partial summary judgment, she merely states that "she cannot perform the class of factory jobs that violates [sic] her restrictions." Such conclusory statements are not sufficient, in and of themselves, to satisfy a claimant's burden to show that she is restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes. *See Mendoza v. Borden*, 158 F.3d 1171, 1175 (11th Cir. 1998)(holding that plaintiff "presented no evidence to show that she cannot perform a broad range or class of jobs; instead, she simply makes the vague assertion that she is unable to perform any job that [requires her to lift more than seven pounds] . . . .").

Dr. Weikel's report is insufficient for several reasons. First, Dr. Weikel based his report, primarily, on Plaintiff's past medical records, some of which were dated well after TMMK's alleged refusal to accommodate her needs in the Fall of 1996.[5] Because determining whether an individual is disabled requires examination of the claimant's condition at the time of the challenged discriminatory action, *see Kocsis v. Multi-Care Management*, 97 F.3d 876, 884 (6th Cir. 1996), the referenced reports relied upon by Dr. Weikel significantly impair the accuracy of his diagnosis.

More importantly however, Dr. Weikel's report does not conform itself to the appropriate standard. The accompanying regulations make a plaintiff's burden clear: she must show, by a preponderance of the evidence, that her impairment significantly restricts her from performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR § 1630.2(j)(3)(i). In conjunction with this standard, the regulations set forth a detailed set of factors designed to facilitate a claimant's burden in this area. As referenced above, these factors include: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). *See* § 1630.2(j)(3)(ii)(A)-(C).[6]

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[5] For example, Dr. Weikel's report includes two reports by Dr. Mark Smith that are dated February 19, 1997 and July 15, 1997.

[6] While reliance on the factors set forth in § 1630.2(j)(3)(ii)(A)-(C) is not mandatory, the Court can find no

From these factors, at least one thing is clear: determination of whether one is substantially limited in the major life activity of working requires an examination, and therefore evidence, of a claimant's ability, or inability, to access the job market *in her own geographical area*. First, the record, including Dr. Weikel's report, makes no reference to the geographical area to which Williams has reasonable access. Secondly, to say, as Dr. Weikel's report does, that the number of *jobs in the economy* that Williams could perform was reduced by 50%, offers no assistance in evaluating her true employability within *her own geographical area*. Nowhere does Dr. Weikel's report indicate the "number and types of jobs utilizing similar training, knowledge or abilities, within [Plaintiff's] geographical area, from which [she] is also disqualified because of [her] impairment." Nor does his report contain evidence indicating "the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within [Plaintiff's] geographical area, from which [she] is also disqualified because of [her] impairment." Absent some kind of evidentiary showing comporting with these criteria, Plaintiff cannot show that she is substantially limited in the major life activity of working. *See e.g., Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1999); *Swain v. Hillsborough Co. School Bd.*, 146 F.3d 855, 858 (11th Cir. 1998)(granting defendant's motion for summary judgment because of plaintiff's failure to provide evidence per

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reason not to follow them in this case. This is especially true in light of the overall difficulty in determining a claimant's inability to perform either a class of jobs or a broad range of jobs in various classes. Reliance is also proper in light of the Supreme Court's apparent willingness to use administrative regulations in construing the ADA. *See e.g., Bragdon v. Abbott*, 118 S.Ct. 2196 (1998). The Court is confident that reliance on the regulatory factors will neither surprise nor disadvantage either party. For example, Plaintiff's reply to Defendant's response to her motion for partial summary judgment includes the following statement: "This Court must apply the guidelines and factors found in the federal regulations to the specific facts of this case to determine if Ms. Williams is disabled."

§ 1630.2(j)(3)(ii)(A)-(C)); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994); *Jasany v. United States Postal Serv.*, 775 F.2d 1244, 1249 (6th Cir. 1985).[7]

Finally, in *McKay v. Toyota Motor Mfg.*, 110 F.3d 369 (6th Cir. 1997), the Sixth Circuit, presented with vocational evidence nearly identical to those contained in Dr. Weikel's report, declined to find that plaintiff, a former production line employee of TMMK, was substantially limited in her ability to work. In *McKay*, the plaintiff was working modified duty with several job restrictions similar to Williams' when her employment was terminated.[8] In the ADA based lawsuit that followed, McKay produced expert testimony compelling a finding that she was "significantly restricted in her ability to perform any medium or heavy work." *Id.* at 373. However, that same expert admitted that McKay's position with TMMK never required that she perform medium or heavy work. In finding that McKay was not substantially limited in the major life activity of working, the Court stated:

> Since plaintiff's work history at Toyota involved only light work, and she made no showing that she ever was able to perform medium or heavy work, one is hard pressed to comprehend how she could have been regarded as a "qualified individual" with respect to medium and heavy work.

Id. Not only has Williams admitted that her positions with TMMK never required her to perform medium duty work, she also admits the absence of medium duty work from her

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[7] Citing cases from both the Fifth and Eighth circuits, the Court in *Swain*, stated that "[a]lthough a plaintiff seeking recovery under the ADA is not required to provide a comprehensive list of jobs which she cannot perform, the person must provide some evidence beyond the mere existence and impact of a physical impairment to survive summary judgment." *Swain*, 146 F.3d at 858.

[8] McKay's working restrictions included the following: maximum lifting of twenty pounds; no vibrating tools; and no repetitive use of her right hand. *McKay*, 110 F.3d at 371.

entire work history. Like the Court in *McKay*, this Court is unable to see how Williams could be considered a "qualified individual"[9] with respect to medium and heavy duty work.[10] Accordingly, Plaintiff has failed to show that she suffers from a physical impairment that substantially limits a major life activity.

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[9] The Court is aware that the phrase "otherwise qualified" is not typically a part of the "disability" inquiry. Rather, it comes into play later when deciding whether one, already determined to be disabled, can perform the essential functions of a job with or without a reasonable accommodation. As used in *McKay*, this Court can only assume that the Court of Appeals was either referring to the larger phrase commonly used in an ADA analysis, an "otherwise qualified individual with a disability," or simply jumped-the-gun and moved forward to the "otherwise qualified" inquiry without notice. The distinction, however, is meaningless as a plaintiff's prima facie case requires a showing of both a disability and that she was otherwise qualified.

[10] The expert in *McKay* also testified that "there were a broad range of jobs that [plaintiff] could perform." *Id.* at 373. Likewise, in his report Dr. Weikel's states that it is his belief that Plaintiff "could return to the paint inspection job at Toyota . . . if these jobs were available to her." In fact, throughout the relevant time period, Fall of 1996, Williams' suggested reasonable accommodation was to be reassigned to the paint inspection and assembly jobs that she performed without difficulty prior to being cross-trained on the body shop inspection job. While the ability of a claimant to perform one job does not necessarily translate into the conclusion that she is not substantially restricted in her ability to work, courts have suggested that such a fact is at least a relevant consideration. *See e.g., Standard v. A.B.E.L. Services, Inc.*, 1998 WL 834520, *7 (11th Cir. (Ga.))(because plaintiff admitted that he was fully capable of performing his job at all times, he cannot be considered disabled); *Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995)(holding that the "inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working").

(2) Plaintiff's Status as an Individual with a Disability; §12102(2)(B)

Williams has failed to show that during the Fall of 1996 she was suffering from a physical impairment that substantially limited a major life activity. However, under § 12102(2)(B), she may still qualify as an individual with a disability if she can point to a record revealing an impairment that would substantially limit a major life activity.[11] In part, this definition was designed "to ensure that people are not discriminated against because of a history of disability." 29 CFR pt. 1630, App. p. 349. The definition is met if a claimant can show employer reliance on a record that "indicates that the individual has or has had a substantially limiting impairment." *Id.* In other words, a record must reveal more than some past physical or mental impairment; it must show an impairment that would qualify under § 12102(2)(A). Because Plaintiff has pointed to no such document, she cannot attain disabled status through this provision of the ADA's definition of disability.

In support of her claim under § 12102(2)(B), Williams' motion for partial summary judgment states that "Toyota's IHS records all show that Ms. Williams has [an] impairment." Furthermore, she claims that her "workers' compensation records also show [her] to be substantially disabled."[12] Neither of these assertions, however, lend

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[11] With regard to becoming an individual with a disability under § 12102(2)(B) and (C), Williams has not pointed to any particular major life activities other than the ones discussed under the § 12102(2)(A) analysis above. Consequently, the Court assumes she is intending to keep the same major life activities that were mentioned earlier, i.e., manual tasks, housework, gardening, playing with her children, lifting and working.

[12] Williams also notes that her name was on a list of "placed people" because TMMK knew she had problems with her upper extremities, shoulders, arms and wrists. However, she does not suggests that this list contained a description of her physical impairments themselves. As a result, this evidence is more appropriate for her claim under § 12102(2)(C), that she was

credence to the proposition that TMMK relied on any record reflecting a § 12102(2)(A) disability. First, Williams has failed to direct the Court's attention to single individual piece of paper that would satisfy her claim. Rather she makes a broad reference to "Toyota's IHS records." Even if her alleged pool of records were narrowed, there is nothing to suggests that any of Toyota's IHS records indicate any impairments, physical or mental, that were not taken into account under the 12102(2)(A) analysis above. Moreover, Williams fails to suggests any reliance by TMMK on the IHS records. Finally, reference to Plaintiff's workers' compensation records, by itself, is also insufficient in that it too fails to mention any impairments that were not taken into account under the § 12102(2)(A) analysis above.[13]

(3) Plaintiff's Status as an Individual with a Disability; § 12102(2)(C)

Williams' also contends that she is an individual with a disability under § 12102(2)(C). That section encompasses within the protection of the ADA individuals who are regarded as having an impairment that substantially limits a major life activity. The accompanying regulations identify three methods by which an individual may satisfy this third definition of disability:

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

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perceived or regarded as an individual with a disability, and is considered below.

13 According to the EEOC, "[t]he fact that an individual . . . is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of 'disability' under [§ 12102(2)(B)]." This is because other statutes or programs, including workers' compensation "may have a definition of 'disability' that is not the same as the definition set forth in the ADA." 29 CFR pt. 1630, App. p. 349.

> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
>
> (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

29 CFR pt. 1630, App. p. 350.

As an alternative to § 12102(2)(A), Williams claims coverage under the above first method. The thrust of her claim centers around both the settlement and results of Williams' prior workers' compensation claim and her subsequent 1993 ADA claim against TMMK. Specifically, she points out that her workers' compensation claim with TMMK was settled and that she agreed to accept temporary weekly payments based on a 20% permanent occupational disability. Upon returning to work, however, she was disappointed in how TMMK dealt with her then imposed medical restrictions. Although she pursued an ADA claim, that too was settled, and Williams returned to work at Toyota in December of 1993. It was at this time that she was assigned to a team in QCIO. Williams appears to be claiming that upon settling her workers' compensation claim, TMMK regarded her as being at least 20% disabled. In addition, she claims that when she returned to work at TMMK her name was put on a list of "placed people" with physical problems who, according to Williams, were regarded by TMMK as suffering from a disability.

Satisfaction of § 12102(2)(C) turns on the employer's perception of the employee and, therefore, involves matters of intent rather than whether or not the claimant actually suffers from a disability. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 645 (2nd Cir. 1998). However, an employer's awareness of some sort of impairment is not enough. Instead, a plaintiff must show that her employer perceived her as having an impairment that qualifies as a disability under § 12102(2)(A). That is, the Plaintiff must allege that her employer actually perceived her as having an

impairment that substantially limited one or more major life activities. *See Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996). Plaintiff has failed to aver sufficient evidence that could lead a reasonable juror to believe she was regarded by her employer as an individual with a disability.

That TMMK agreed to pay Plaintiff weekly benefits based on a 20% permanent occupational disability as a part of her workers' compensation settlement, falls far short of proving that TMMK regarded Williams as suffering an impairment that substantially limited one of her major life activities, presumably that of working.[14] Certainly, this fact sheds no light on whether TMMK regarded Williams' condition as substantially limiting any other major life activity. Moreover, examination of the settlement agreement reveals the following sentence: "The parties agree that there remains a dispute as to causation as well as extent and duration of disability, *if any*." (Emphasis added). This sentence clearly shows TMMK's disagreement with Plaintiff's alleged physical condition. Rather than being an instrument reflecting Defendant's perception of Williams as one with a disability, the settlement agreement is no more than a document indicating the presence of two adverse parties coming together to enter into some sort of compromise. Certainly more is required of a plaintiff before this Court will find standing under § 12102(2)(C).

Similarly, despite her allegations that she was put on a list of "placed people," Williams has not annunciated how that

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[14] Although it is assumed that, with respect to § 12101(2)(C), Williams' primary claim is that TMMK regarded her as suffering from an impairment that substantially limited her major life activity of working, the Court's analysis encompasses all major life activities included under the § 12102(2)(A) analysis above. It is interesting to note that while Williams asserts that TMMK regarded her as suffering from an impairment that substantially limited her ability to work, her primary complaint in this lawsuit is that TMMK "forced" her to perform duties that she insisted were beyond her capabilities.

evidence tends to support her claim that TMMK regarded her as suffering from a disability. The mere fact that an employer is aware of or documents an employee's impairment(s) is not, in and of itself, enough to show that the employer believed that the impairment substantially limited a major life activity. *See Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 976 (6th Cir. 1996). If it is Williams' contention that TMMK used this list to ensure employee placement that would not conflict with their working restriction—conduct usually deemed a reasonable accommodation and required of an employer under the ADA—it would not amount to being regarded as an employee with a disability under §12102(2)(C). *See Byrne v. Board of Education*, 979 F.2d 560, 567 (7th Cir. 1992)(holding that "an employer does not necessarily regard an employee as [disabled] simply by finding the employee to be incapable of satisfying the singular demands of a particular job"); *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1419 (10th Cir. 1992)(same).

B. Plaintiff's Termination.

Having determined that Williams suffered from no disability at the time TMMK allegedly refused to accommodate her, attention is turned to her eventual termination in January of 1997. Because Plaintiff has charged that TMMK terminated her employment in violation of Title I of the ADA, it is necessary that she aver, by a preponderance of the evidence, a prima facie case of discrimination as to TMMK's termination of her employment. Again, constructing a prima facie case requires Plaintiff to show that—(1) she is an individual with a disability; (2) she is otherwise qualified for the job; and (3) that the defendant either refused to make a reasonable accommodation for her disability or made an adverse employment decision regarding her solely because of her disability. *See Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997). Because Williams cannot show that she was an otherwise qualified individual, this claim too must fail.

For purposes of this analysis, the Court will assume that Williams, in January of 1997, was suffering from a cognizable disability under the ADA. She must still show, however, that she was a qualified individual with a disability at that time. *See Griffith v. Wal-Mart Stores Inc.*, 135 F.3d 376, 380 (6th Cir. 1998)(holding that a claimant must show that she is an otherwise qualified individual at the time of the challenged adverse employment decision). Thus, she bears the burden of demonstrating that she was an individual with a disability who, with or without reasonable accommodation, [could have] perform[ed] the essential functions of [her] employment position" with Defendant. 29 U.S.C. § 12111(8). A plaintiff who cannot perform the essential functions of her job, with or without reasonable accommodations, is not an otherwise qualified individual under the ADA, *see Tuck v. Health Services of Tennessee, Inc.*, 7 F.3d 465, 471 (6th Cir. 1993), and cannot seek the protections therein.

There can be no question that, at least without a reasonable accommodation, Williams was unable to perform the essential functions of her job in January of 1997. On December 6, 1996, one of Williams' treating physicians placed her under a *no work of any kind restriction.* According to Plaintiff's own testimony, this restriction meant exactly that: she was unable to perform any work at all for her employer or anyone else. The full extent of this restriction was squarely addressed in her deposition:

> Q: And I guess you explained it earlier, but just for my edification here again, no work means that, it's self-explanatory; you're not supposed to work at all until you're well; is that correct?
>
> WILLIAMS: That's correct.[15]

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[15] In her response to Defendant's motion for summary judgment, Plaintiff argues that the interpretation of the no work of any kind restriction constitutes a genuine material issue of fact precluding summary judgment. She states:

> Finally, there is an unresolved factual issue concerning whether Ms. Williams' "no work" restriction would have prevented her from doing no work at all. Frankly, Ms. Williams' counsel is unclear as to the scope of the "no work" restriction. It is unknown whether that restriction applies to any work of any nature or whether the restriction was put in effect because the doctors understood that part of Ms. Williams' work was the performance of the [body shop inspection] job. This is an unresolved matter which also would prevent a summary judgment being issued as requested by Toyota. The record is silent as to the extent of Ms. Williams' restriction and whether her disabilities could have been accommodated within the restrictions.

(Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment, at 10-11). However, Plaintiff's counsel seems to ignore the testimony given by Williams' in her deposition and quoted in the body of this Opinion. In addition to the portion of her testimony related above, Williams' deposition also contains the following unequivocal statement:

> Q: And at the present time you have restrictions against doing any work of any kind; is that correct?
>
> WILLIAMS: Yes.

(Williams Deposition Volume I, at 7). Finally, towards the end of her deposition, the following exchange takes place:

> Q: Seeing that you're on a no-work restriction and have been since December of 1996, you haven't been able to apply for other employment, have you?
>
> WILLIAMS: No.
>
> Q: Not even office jobs or anything; correct?
>
> WILLIAMS: No.

(Williams Deposition Volume I, at 151).

included her duties in body shop inspection or were limited to her original position performing in assembly and paint inspection. *See Weiler v. Household Finance Corp.*, 101 F.3d 519, 525 (11th Cir. 1996) (finding that plaintiff was not an otherwise qualified individual because she was under a no work of any kind restriction by a treating psychotherapist); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 564 (7th Cir. 1996).

Despite the above, Williams may still be an otherwise qualified individual if she can demonstrate that a reasonable accommodation on behalf of TMMK would have allowed her to perform the essential functions of her job. As a plaintiff, Williams bears the burden of proposing such an accommodation. *Smith v. Ameritec*, 129 F.3d 857, 866 (6th Cir. 1997) (claimant bears the burden of proposing a reasonable accommodation). In satisfying this requirement, Williams' only proposed reasonable accommodation was for TMMK to reassign her back to her original duties in assembly and paint inspection. While reassignment can at times amount to a reasonable accommodation under the ADA, *see* § 12111(9)(B), such is not the case in this situation. Williams' proposed accommodation of reassignment fails to address the no work of any kind restriction imposed upon Williams at the time of her termination. Having admitted that she could not perform any work at TMMK as a result of these restrictions, reassignment to assembly and/or paint inspection would not have constituted a reasonable accommodation. *See Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 678 (7th Cir. 1998)(recognizing that "[t]he ADA itself tells us that it encompasses reassignment to a vacant position for which the employee is 'qualified'"); *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 525-26 (11th Cir. 1996) (reassignment not a reasonable accommodation in light of plaintiff's admission that she was unable to perform any work at the time).

V. The Family and Medical Leave Act

Intentionally absent from the statement of facts above are Plaintiff's specific factual allegations comprising her claim

that Defendant interfered with her rights as protected by the FMLA. In its motion for summary judgment, TMMK argues that even assuming a violation, Williams has failed to show she has suffered any damages available under the FMLA. Defendant maintains that summary judgment is proper in this situation. In response, Plaintiff's only evidence to rebut Defendant's motion concerns statements surrounding the extent of her bodily injuries. In the alternative, Plaintiff's position seems to be that the unavailability of non-bodily injuries should not serve as grounds to grant Defendant's motion. For the reasons stated below, the Court finds Defendant's position persuasive.

The available remedies under the FMLA are expressly stated in §2617. That section provides that an employer who violates the Act is liable for "damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C. §2617(a)(l)(A)(i)(I). Plaintiff's claim for bodily injury is not a wage, salary, or employment benefit, and several courts have held, and this Court agrees, that the phrase "other compensation" requires "some type of quid pro quo exchange between an employer and its employee." *McAnnally v. WYN South Molded Prod., Inc.*, 912 F.Supp. 512, 513 (N.D. Ala. 1996). *See also, Vicioso v. Pisa Bros., Inc.*, 1998 WL 355415, *4 (S.D.N.Y. 1998) (following *McAnnally*). In other words, general compensatory damages arising out of a violation of the FMLA are not recoverable.[16] In fact, the Court in *Vicioso*

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16 In *McAnnally*, the Court explained:

> When the FMLA speaks of "other compensation" as a possible measurement of damages, it does so as the fourth item in a series, and the three other items include (1) wages, (2) salary, and (3) employment benefits. The terms wages, salary, and employment benefits imply some type of quid pro quo exchange between an employer and its employee. Appearing as it does with the terms wages, salary, and employment benefits, the term "other compensation" also implies some type of quid pro quo exchange between an employer and its employee. The term does not imply a

specifically rejected the idea that an employee can recover damages for bodily injury resulting from an employer's violation of the FMLA. *Id.* (holding that "injured employees may not recover for anxiety or physical injury suffered as a result of a FMLA violation").[17]

In addition to the legal remedies provided under §2617, the FMLA authorizes federal courts to grant "such equitable relief as may be appropriate, including employment, reinstatement, and promotion." §2617(a)(1)(B). Even if Williams' response to Defendant's motion for summary judgment had attempted to state that she was seeking reinstatement with TMMK, the Court would still be left unpersuaded. The record clearly indicates that on December 6, 1996 Williams was subjected to her physician's restrictions from *any work of any kind*. Furthermore, as of September 12, 1997, the date of her deposition in this case, not only was Williams still subject to, and complying with, these restrictions, but when asked was unable to give a date when she felt her restriction from working would be lifted. In light of this undisputed evidence, the Court is unable to

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reimbursement formula for "mental distress" stemming from loss of job security.

McAnnally, 912 F.Supp. at 513. This Court adopts this rationale and believes it justifies the exclusion of general compensatory damages meant to reimburse a claimant for bodily injury.

17 If an employee proves a violation of the FMLA but has suffered no reduction in wages, salary, or other employment benefits, she may still recover "any actual monetary losses sustained by the employee as a direct result of the violation, such as the costs of providing care, up to a sum equal to 12 weeks of wages or salary for the employee." §2617(a)(1)(A)(i)(II). Rights protected by the FMLA include employees' rights to seek leave from work in order to prepare for a birth, place a child into adoption, or to simply care for ones child, spouse, or parent. *See* §2612(a)(1)(A)-(C). The "actual monetary losses" available under §2617(a)(1)(A)(i)(II) are limited to those plaintiffs asserting rights protected under §2612(a)(1)(A)-(C) as opposed to someone in Williams' position who has never claimed that she has suffered an economic loss in "providing care" to a family member.

identify, and the Plaintiff has failed to show, any equitable relief that would be appropriate under these circumstances.

Nor is the Court persuaded that Plaintiff can take advantage of §2617(a)(3) which allows a court to grant, "in addition to any judgment awarded to the plaintiff, . . . reasonable attorney's fee[s], reasonable expert witness fees, and other costs of the action . . . ." At least one court has read the language of § 2617(a)(3) as providing litigation related costs only when a plaintiff is otherwise successful under §2617(a)(1), including a judgment granting affirmative or other equitable relief. *See Dawson v. Leewook Nursing Home Inc.*, 14 F.Supp.2d 828, 834 (E.D. Va. 1998)(holding that the language of §2617(a)(3) "makes it clear that the FMLA requires that attorney's fees be awarded when a violation of the Act is established, but only in addition to a judgment"). This Court agrees. In enacting the FMLA, Congress sought to redress, among other things, a perceived inadequacy of "job security for employees who have serious health conditions that prevent them from working for temporary periods." §2601(a)(4). Consequently, the primary purpose behind the FMLA is to ensure that employees are able to take off from work upon the happening of certain conditions without fear of losing any employment related benefits. *See* §2601(b). In furtherance thereof, the Act should be applied in order to strike a balance between the personal needs of employees with the legitimate business requirements of employers by maintaining, to some degree, the parties' contractual status quo during difficult times. *See id.* §2601(b)(1) and (3). To allow the Plaintiff, especially at the summary judgment stage, to proceed with her claim under the FMLA in the absence of any showing of an employment benefit related loss would be contrary to the intent behind the Act.

Once TMMK's motion for summary judgment directed the Court's attention to the lack of evidence in the record concerning Plaintiff's available remedies under the FMLA, it was Plaintiff's obligation under Rule 56(e) to set forth specific facts showing the presence of a genuine issue for

trial. Having determined that Plaintiff has failed to satisfy this burden, the Court must grant Defendant's motion for summary judgment. Other courts have so held. *See e.g.*, *Cianci v. Pettibone Corp.*, 152 F.3d 723, 729 (7th Cir. 1998) (granting defendant's motion for summary judgment where plaintiff "failed to come forth with any evidence that she has a remedy under the FMLA"); *Dawson v. Leewook Nursing Home, Inc.*, 14 F.Supp.2d 829 (E.D. Va. 1998) (same); *Settle v. S.W. Rodgers, Co., Inc.*, 998 F.Supp. 657 (E.D. Va. 1998) (granting motion to dismiss because plaintiff's failure to allege injuries cognizable under the FMLA); *Dodgens v. Kent Manufacturing Co.*, 955 F.Supp. 560 (D.S.C. 1997) (summary judgment); *Lloyd v. Wyoming Valley Health Care Sys., Inc.*, 994 F.Supp. 298 (M.D. Pa. 1998) (same).

VI. Conclusion

Accordingly, **IT IS HEREBY ORDERED AND ADJUDGED**,

1) that Defendant's motion for summary judgment [Record No. 99] is **GRANTED**;

2) that Plaintiff's motion for partial summary judgment [Record No. 103] is denied as **MOOT**;

3) that Defendant's motions in limine [Record Nos. 96 and 147] are denied as **MOOT**;

4) this action is dismissed with prejudice and shall be stricken from the docket; and

5) this is a final and appealable order.

This 22 day of January, 1999.

/s/_____
Henry R. Wilhoit, Jr., Chief Judge

[Filed January 27, 1999]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-135

ELLA WILLIAMS,
Plaintiff,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant.

JUDGMENT

Consistent with the Memorandum Opinion and Order entered this date and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED,

1) the Defendant's motion for summary judgment [Record No. 99] is **GRANTED**;

2) that Plaintiff's motion for partial summary judgment [Record No. 103] is denied as **MOOT**;

3) that Defendant's motions in limine [Record Nos. 96 and 147] are denied as **MOOT**;

4) this action is dismissed with prejudice and shall be stricken from the docket; and

5) this is a final and appealable order.

This 27 day of January, 1999.

/s/_____
Henry R. Wilhoit, Jr., Chief Judge

APPENDIX D

[Filed October 12, 2000]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5234

ELLA WILLIAMS,
Plaintiff-Appellant,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant-Appellee.

ORDER

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.